Supreme Court, U. S.
FILED
OCT 11 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-539

ZENITH RADIO CORPORATION, *Petitioner,*

v.

THE UNITED STATES, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

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October 1977

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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ZENITH RADIO CORPORATION, *Petitioner*,

v.

THE UNITED STATES, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

The petitioner, Zenith Radio Corporation, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Customs and Patent Appeals entered in this proceeding on July 28, 1977.

OPINIONS BELOW

The opinion of the United States Customs Court (C.D. 4691) and the concurring opinions are reported at 430 F.Supp. 242, 78 Cust. Ct. ——, and Customs Bulletin and Decisions of May 11, 1977, page 44. These opinions are reproduced in Appendix A to this Petition, pages 1a-50a. The judgment of the Customs Court is reproduced in Appendix B to this Petition, pages 53a-54a.

The opinion of the United States Court of Customs and Patent Appeals (C.A.D. 1195) and the dissenting opinion are reported at —— F.2d ——, 64 C.C.P.A. ——, and Customs Bulletin and Decisions of August 17, 1977, page 6. These opinions are reproduced in Appendix C to this Petition, pages 57a-112a.

JURISDICTION

The judgment of the Court of Customs and Patent Appeals was entered on July 28, 1977. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1256 (1970).

QUESTIONS PRESENTED

1. Whether the remission or forgiveness of a tax on products exported to the United States, when like products which are sold or consumed in the country of their production are subject to such tax, constitutes the payment or bestowal, directly or indirectly, of a bounty or grant, for purposes of section 303 of the Tariff Act, as amended (19 U.S.C. § 1303 (Supp. V 1975)).

2. Whether summary judgment may properly lie in favor of the Government when predicated on a presumption that the Secretary of the Treasury made some private and unrevealed determination that the economic result of the forgiveness of the Japanese Commodity Tax on exports to the United States was not the conferring of a benefit countervailable under section 303.

STATUTES INVOLVED

Section 303 of the Tariff Act of 1930, as amended (19 U.S.C. § 1303 (Supp. V 1975); *see* Appendix D to this Petition for full text, pages 115a-120a):

"§ 1303. Countervailing duties.

"(a) Levy of countervailing duties.

"(1) Whenever any country, dependency, colony, province, or other political subdivision of government, person, partnership, association, cartel, or corporation, shall pay or bestow, directly or indirectly, any bounty or grant upon the manufacture or production or export of any article or merchandise manufactured or produced in such country, dependency, colony, province, or other political subdivision of government, then upon the importation of such article or merchandise into the United States, whether the same shall be imported directly from the country of production or otherwise, and whether such article or merchandise is imported in the same condition as when exported from the country of production or has been changed in condition by remanufacture or otherwise, there shall be levied and paid, in all such cases, in addition to any duties otherwise imposed, a duty equal to the net amount of such bounty or grant, however the same be paid or bestowed."

Section 516(d) of the Tariff Act of 1930, as amended (19 U.S.C. § 1516 (Supp. V 1975); *see* Appendix D to this Petition for text, pages 120a-121a).

Section 331(d) of the Trade Act of 1974 (Pub. L. No. 93-618, 88 Stat. 1978, 2053 (1975); *see* Appendix D to this Petition for text, page 121a).

STATEMENT

Background

The countervailing duty law, which this case involves, has remained unchanged in all material respects since the first countervailing duty statute of general application was enacted in 1897.[1] The law has been twice

[1] Tariff Act of 1897, § 5, 30 Stat. 151, 205.

construed by this Court: in 1903 (*Downs* v. *United States,* 187 U.S. 496) and in 1919 (*Nicholas & Co.* v. *United States,* 249 U.S. 34). In each case, this Court taught, generally, that the scope of the statute was extremely broad and, specifically, that the remission of taxes by foreign countries upon the exportation of articles which are subjected to a tax when sold or consumed in the country of production constituted the conferral of a bounty or grant within the contemplation of the statute.

Against this background, on April 3, 1970, petitioner, a domestic manufacturer of various consumer electronic products, filed with the Commissioner of Customs a petition under section 303 of the Tariff Act of 1930, seeking the assessment of countervailing duties on certain consumer electronic products from Japan since such products (in addition to being bountied by other means) are exempt from a so-called "commodity tax" when exported. R. 11-12, 20, 320, 326-328.[2] The petition was met with inordinate delay by the Treasury Department and, in fact, it was not until Congress "forced" the Department to act that a final determi-

[2] "R." refers to the printed transcript of record in the Court of Customs and Patent Appeals, a copy of which has been filed with the Clerk of this Court.

The essential facts regarding the commodity tax are not in dispute. The relevant Japanese law, the Commodity Tax Law, Law No. 48 of 1962, imposes a single-stage commodity tax upon a manufacturer's shipment of specified electronic (and other) products for consumption in Japan. The same products are exempt from the tax when shipped for export. A tax paid on a shipment for home consumption is refunded if that shipment is later exported. R. 15-17, 21-22.

nation was issued on January 7, 1976.[3] 41 Fed. Reg. 1298 [R. 7]. Treasury then determined that "no bounty or grant is being paid or bestowed, directly or indirectly, within the meaning of section 303, Tariff Act of 1930, as amended (19 U.S.C. 1303), upon the manufacturer [*sic*], production, or exportation of certain consumer electronic products from Japan." *Ibid.* No reason was given why the forgiveness of the commodity tax or exportation did not constitute a bounty or grant within the settled judicial interpretation of the statute.

Decision of the Customs Court

Pursuant to the recently enacted subsecion (d) of section 516 of the Tariff Act of 1930 (19 U.S.C. § 1516 (d) (Supp. V 1975)), petitioner commenced suit in the Customs Court to challenge the negative determination of the Secretary of the Treasury.[4]

[3] On January 3, 1975, Congress enacted the Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1978 (1975). Section 331(a) of the Trade Act amended the countervailing duty statute, by, among other things, requiring the Secretary of the Treasury to make a final determination as to whether or not any bounty or grant is being paid or bestowed within twelve months from the date on which a petition is filed. Section 331(d) of the Trade Act provided, in effect, that, with respect to investigations in progress on the date of enactment of the Trade Act, a final determination would have to be made within twelve months of the day following the date of enactment.

[4] That Court had jurisdiction under 28 U.S.C. § 1582(b) (1970). Section 321(f) of the Trade Act added subsection (d) to section 516 of the Tariff Act of 1930, in direct response to a decision of the Court of Customs and Patent Appeals which had held that the Customs Court did not have jurisdiction over American manufacturers' challenges of negative countervailing duty determinations by the Secretary of the Treasury. *United States* v. *Hammond Lead Products, Inc.*, 440 F.2d 1024 (C.C.P.A.), *cert. denied*, 404 U.S. 1005 (1971). This is the first case brought under section 516(d) to be decided by the courts.

After issue was joined,[5] each side moved for summary judgment. Petitioner contended that, as a matter of law, the forgiveness of the commodity tax on the exportation from Japan of the subject electronic products constitutes the direct or indirect payment or bestowal of a bounty or grant cognizable under section 303. The respondent, on the other hand, contended that, as a matter of law, the tax forgiveness on exportation does not constitute a bounty or grant. Further, upon application by the respondent, a three-judge panel was convened pursuant to 28 U.S.C. § 255 (1970).[6]

The Customs Court rendered its decision and judgment on April 12, 1977, in favor of petitioner. Relying significantly upon *Downs* and *Nicholas, supra,* the Court (per Richardson, *J.*, Newman, *J.*, and Boe, *J.*) unanimously held that the forgiveness of the Japanese commodity tax on exportation constituted the conferral of a bounty or grant under section 303, as a matter of

[5] In its complaint, petitioner contested the negative countervailing duty determination with respect to the following products: television receivers, radio receivers, radio-phonograph combinations, radio-television-phonograph combinations, radio-tape recorder combinations, record players and phonographs complete with amplifiers and speakers, tape recorders, tape players, and color television picture tubes. R. 15.

[6] 28 U.S.C. § 255 (1970) provides:

"§ 255. Three-judge trials

"(a) Upon application of any party to a civil action, or upon his own initiative, the chief judge of the Customs Court shall designate any three judges of the court to hear and determine any civil action which the chief judge finds: (1) raises an issue of the constitutionality of an Act of Congress, a proclamation of the President or an Executive order; or (2) has broad or significant implications in the administration or interpretation of the customs laws.

"(b) • • • • •"

law. Each of the three judges wrote a separate opinion.

In its order (judgment), the Customs Court directed the Secretary of the Treasury "to ascertain and determine or estimate the net amounts of the bounty or grant paid or bestowed on the exportation of the subject electronic products from Japan and to order the appropriate customs officers throughout the United States to assess countervailing duties, in said net amounts equal to the said bounty or grant, on the subject electronic products exported from Japan, entered or withdrawn from warehouse for consumption on or after the day following the date of entry of this Order." Appendix B, page 53a.

Decision of the Court of Customs and Patent Appeals

On April 15, 1977, the respondent filed a timely appeal with the Court of Customs and Patent Appeals.[7] On July 28, 1977, that Court, in a 3-to-2 decision, reversed the decision and judgment of the three-judge Customs Court. Writing for the majority, Chief Judge Markey stated that the language in *Downs* relied upon by the Customs Court was *dicta* and did not have to be followed, that the Treasury Department had a long-established practice of not countervailing "nonexcessive" tax remissions, that Congress acquiesced in this practice, and that the Secretary of the Treasury had "presumably determined" that the economic result of the tax remission is not a countervailable benefit. The Court directed that summary judgment be entered for the respondent. Judge Miller, writing for himself and Judge Baldwin in dissent, observed that the key lan-

[7] That Court has jurisdiction under 28 U.S.C. § 2601 (1970).

guage of *Downs* was not *dicta* but was basic to this Court's decision, that *Downs* prevails over any administrative practice, that Congressional acquiescence in such practice is a myth, and that the controlling question is a matter of law and not a factual inquiry into economic result.

REASONS FOR GRANTING THE WRIT

I. The Court of Customs and Patent Appeals Has Decided A Federal Question In Clear Conflict With An Applicable Decision Of This Court, Which In Turn Has Been Ratified By Congress.

The *Downs* case, the first of two countervailing duty cases decided by this Court, involved an elaborate scheme of the Russian Government to control the production and price of sugar. Exporters of sugar were relieved of the ordinary excise tax which would have been payable had the sugar been sold domestically, and additionally, they received marketable certificates of value for their exports. These certificates could be sold to other sugar producers who would then be free to have their surplus sugar reclassified as free sugar and sold in the domestic market without the prohibitive tax burden that would otherwise accompany the sale of surplus. This Court, addressing itself to this scheme, stated (187 U.S. at 515):

> "The details of this elaborate procedure for the production, sale, taxation, and exportation of Russian sugar are of much less importance than the two facts which appear clearly through this maze of regulations, *viz.*: that no sugar is permitted to be sold in Russia that does not pay an excise tax of R. 1.75 per pood, and that sugar exported pays no tax at all. . . . When a tax is imposed upon all sugar produced, but is remitted upon all sugar exported, then, by whatever process, or in whatever manner, or under whatever name, it is disguised, it is a bounty upon exportation."

The majority of the Court of Customs and Patent Appeals stated that the foregoing was *dicta* and that this Court really held that the tax remission in conjunction with the other features of the Russian scheme bestowed a bounty.

We submit that the three-judge majority of the Court of Customs and Patent Appeals engaged in an absolutely impermissible reading of this Court's decision, which reading conflicted not only with the plain meaning of what this Court said but with readings given to the *Downs* decision by a veritable host of authorities.[8]

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[8] General Appraiser Somerville, speaking for the Board of General Appraisers (predecessor to the Customs Court), in *Wessels & Bro.* v. *United States*, 6 Treas. Dec. 319, 320-321, T.D. 24355 (Bd. Gen. App. 1903); General Appraiser Somerville, speaking for the Board of General Appraisers in *F. W. Meyers & Co.* v. *United States*, 6 Treas. Dec. 260, 265, T.D. 24306 (Bd. Gen. App. 1903); Attorney General Wickersham, in 31 Op. Att'y Gen. 545, 556 (1910); General Appraiser Hay, speaking for the Board of General Appraisers in *Nicholas & Co.* v. *United States*, 29 Treas. Dec. 59, 63-65, T.D. 35595 (Bd. Gen. App. 1915), *aff'd*, 7 Ct. Cust. Appls. 97, T.D. 36426 (1916), *aff'd*, 249 U.S. 34 (1919); Mr. Justice McKenna, speaking for this Court, in *Nicholas & Co.* v. *United States*, 249 U.S. 34, 41 (1919); Assistant Attorney General Hanson in the Government's brief before this Court, in *Nicholas*, *supra*, at 38 (R. 133); Judge Maletz, speaking for himself and Judges Watson and Re (now Chief Judge), of the Customs Court in *Hammond Lead Products, Inc.* v. *United States*, 306 F.Supp. 460 (Cust. Ct. 1969), *reversed on jurisdictional grounds*, 440 F.2d 1024 (C.C.P.A.), *cert. denied*, 404 U.S. 1005 (1971); Judge Almond, speaking for himself and Judge Baldwin, of the Court of Customs and Patent Appeals in dissent, in *United States* v. *Hammond Lead Products, Inc.*, 440

As Judge Miller correctly observed in his dissenting opinion (*see* Appendix C, pages 91a-95a), this Court regarded the remission of excise taxes upon exportation as a bounty or grant and the conferral of certificates to exporters as an *additional* bounty or grant. The Board of General Appraisers, whose opinion had been adopted by the Fourth Circuit, concluded that bounties or grants had been bestowed for two separate reasons: (1) the remission of tax and (2) the issuance of the certificates. *Downs* v. *United States,* 113 F. 144 (4th Cir. 1902), *aff'd,* 187 U.S. 496 (1903). Downs argued that *neither* constituted the conferral of a bounty or grant on exportation;[9] the Government joined issue on both points; and this Court resolved the issues presented to it.[10]

F.2d 1024, 1035 (C.C.P.A.), *cert. denied,* 404 U.S. 1005 (1971); Judge Richardson, speaking for himself and Judge Landis, of the Customs Court in *American Express Co.* v. *United States,* 332 F. Supp. 191 (Cust. Ct. 1971), *aff'd on other grounds,* 472 F.2d 1050 (C.C.P.A. 1973); Sturm, *A Manual of Customs Law,* 415-417 (1974); Judges Richardson, Newman and Boe of the Customs Court and Judge Miller, speaking for himself and Judge Baldwin, of the Court of Customs and Patent Appeals in dissent, in this case.

[9] Downs had argued that the conferral of certificates operated as a bounty on production rather than on exportation (bounties on production not being covered by the statute at that time). In rejecting *Downs'* position, this Court engaged in a discussion of import tariffs which, by way of contrast, were shown by the Court to be a bounty on production but not on exportation. The three-judge majority of the Court below misconceived the purpose of this Court's discussion of import tariffs. *See* Appendix C, page 65a.

[10] Aside from holding that the tax remission on exports of sugar constituted a bounty under the statute, this Court stated (187 U.S. at 502):

> "A bounty may be direct, as where a certain amount is paid upon the production or exportation of particular articles, of which the act of Congress of 1895, allowing a bounty upon the production of sugar, and Rev. Stat. §§ 3015-3027 [U.S. Comp. Stat. 1901, pp. 1989-1994], allowing a drawback upon certain articles exported, are examples; or indirect, by the remission of taxes upon the exportation of articles which are subjected to a tax when sold or consumed in the country of their production, of which our laws, permitting distillers of spirits to export the same without payment of an internal revenue tax or other burden, is an example. *United States* v. *Passavant,* 169 U.S. 16, 42 L.ed. 644, 18 Sup. Ct. Rep. 219."

Indeed, in *Wessels, supra,* two months after this Court's *Downs* decision, the Board of General Appraisers rendered a decision in a case presenting the identical issue involved in *Downs.* Speaking for the Board, General Appraiser Somerville, *who had written the Board's opinion in Downs,* described the *Downs* case as follows (6 Treas. Dec. at 320):

> "The question thus presented is identical with that discussed in Downs' case, G.A. 4912 (T.D. 22984), decided April 19, 1901, in which we held as follows: * * * that the Russian Government pays or bestows a bounty or grant upon the exportation of so-called 'free sugar' so as to work a benefit or advantage to the exporter *in two ways* (a), by remitting or refunding the excise tax due upon the sugar, and (b) by issuing to the exporter a certificate of exportation, carrying with it a privilege of exemption from taxation, which certificate is transferable and has a substantial market value." [Italics added.]

General Appraiser Somerville then proceeded to demonstrate his understanding that this Court, in *Downs,* had reached the same conclusions as the Board. *Id.* at 320-321.

After *Downs* (and *Wessels* and *Meyers*), Congress reenacted the countervailing duty statute in 1909 and

1913." In 1919, in this Court's only other countervailing duty decision, *Nicholas, supra,* the *Downs* teaching [12] was reaffirmed, and the statute was again reenacted, with changes not here relevant, in 1922, 1930 and 1975.[13]

In brief, this Court has held that the remission of tax upon exportation is a bounty or grant within the countervailing duty law. By reenactment of the statute after *Downs* (and *Nicholas*), Congress has ratified such interpretation. The majority of the Court below has simply chosen to read out of the body of our law the only decisions of this Court ever rendered on the subject. We respectfully submit that review by this Court is necessary to correct this impermissible exercise in judicial construction.

II. The Decision Of The Court Of Customs And Patent Appeals That Petitioner Was Not Entitled To Summary Judgment Is Based On An Erroneous Legal Analysis.

After having incorrectly dismissed this Court's specific holding regarding tax remissions and after having ignored this Court's teachings regarding the

[11] Tariff Act of 1909, § 6, 36 Stat. 11, 85; Tariff Act of 1913, § IV, paragraph E, 38 Stat. 114, 193.

[12] "[T]he remission of taxes upon the exportation of articles which are subject to a tax when sold or consumed in the country of their production is . . . [an example of an indirect bounty]." *Nicholas, supra,* 249 U.S. at 41.

[13] Tariff Act of 1922, § 303, 42 Stat. 858, 935; Tariff Act of 1930, § 303, 46 Stat. 590, 687; Trade Act of 1974, § 331(a), 88 Stat. 1978, 2049 (1975), amending section 303 of the Tariff Act of 1930. [In 1922, the statute's coverage was broadened to include bounties or grants on manufacture or production, and paid or bestowed by private entities.]

meaning and scope of "bounty or grant"," the majority below proceeded to conclude that Congress acquiesced in the Treasury Department's administrative practice of countervailing only "excessive" remissions of tax on export—"*i.e.,* the governmental giving of something above and beyond mere excise tax remission." Appendix C, page 74a. However, any such acquiescence, as the dissent demonstrated, is a myth.

According to the record, the first specific notice to Congress (of the administrative practice) came in 1950 (rather than 1949, as stated by the Court below, Appendix C, page 77a), when the Treasury Department sought specific legislation which would have legitimatized the practice. H.R. 8304, Section 2, 81st Cong., 2d Sess. (1950).[15] The Department informed

[14] For example, in *Nicholas,* this Court stated (249 U.S. at 39): "If the word 'bounty' has a limited sense, the word 'grant' has not. A word of broader significance than 'grant' could not have been used. Like its synonyms 'give' and 'bestow,' it expresses a concession,—the conferring of something by one person upon another. And if the 'something' be conferred by a country 'upon the exportation of any article or merchandise,' a countervailing duty is required by [the statute]."

Further, this Court explained that a situation where goods could be sold cheaper in the United States than in the place of their production as a result of an act of Government because their destination was a foreign market was one which the statute intended to cover. *Ibid.*

[15] Section 2 of the bill provided that section 303 of the Tariff Act of 1930 would be amended by the addition of the following language: "• • • The exemption of any exported article or merchandise from a duty or tax imposed on like articles or merchandise when destined for consumption in the country of origin or exportation, or the refunding of such a duty or tax, shall not be deemed to constitute a payment or bestowal of a bounty or grant within the meaning of this section."

Congress of the conflict between judicial rulings and the administrative practice. *See* opinion of Judge Newman of the Customs Court, Appendix A, pages 25a-26a. Congress rejected the proposal.[16]

Remarkably, the Court below found that this refusal to amend the law indicated approval of the administrative practice. We respectfully submit that the contrary should have been inferred.

The majority below also looked to events of (February) 1968—testimony before the Senate Finance Committee advising of Treasury's practice to consider section 303 inapplicable to "nonexcessive" remissions of excise taxes—and reasoned that Congress' failure to take legislative action afterwards was further evidence of acquiescence. However, Congress did take action. *See* dissent, Appendix C, pages 105a-106a. Further, in June 1968, the Ways and Means Committee of the House of Representatives received testimony from domestic steel industry spokemen that notwithstanding the Treasury Department's refusal to apply countervailing duties to offset remissions of indirect taxes on exports, in disregard of decisions

[16] H. R. 8304 was replaced by H. R. 1535, 82d Cong., 1st Sess. (1951), which in turn was supplanted by H. R. 5505, 82d Cong., 2d Sess. (1952). At Senate Finance Committee hearings on H. R. 5505, Senator O'Mahoney spoke against the proposal, identifying it as an "attempt by law to reverse the present rule." *Hearings on H. R. 5505 Before the Senate Comm. on Finance,* 82nd Cong., 2d Sess. 266 (1952). He proceeded to say (*ibid.*):

> "I have not had the opportunity to examine all of the cases, but I have been given to understand, and I understand, that the courts have, without variation, held that such an exemption or such a refunding is a bounty or grant. So here we have an explicit request to reverse that rule."

H. R. 5505 was not reported out of the Finance Committee.

of this Court, the countervailing duty law does not have to be amended—just followed. *See Hearings on Foreign Trade and Tariff Proposals Before the House Comm. on Ways and Means,* 90th Cong., 2d Sess. 2211-28, *esp.* 2225-26 (1968).

Indeed, in May 1971, Joseph S. Wright, then Chairman of the Board of the petitioner, made similar remarks before the Subcommittee on International Trade of the Senate Finance Committee.[17] In his written statement submitted on May 17, 1971, petitioner's Mr. Wright advised the Subcommittee of Japanese subsidy practices, of the pendency of petitioner's countervailing duty petition (then over a year old),

[17] The Subcommittee had just been formed. In the Senate Finance Committee's press release of March 31, 1971, announcing the formation of the Subcommittee, the Committee Chairman, Senator Long, stated, "I would hope that the Subcommittee's inquiry will include an examination of nontariff barriers, and other matters, such as . . . [t]he border tax-export rebate system of the EEC, and the reasons why indirect tax rebates on exports are not considered 'bounties or grants' within the meaning of the countervailing duty statute as interpreted by Supreme Court cases." *Hearings on World Trade and Investment Issues Before the Subcomm. on International Trade of the Senate Comm. on Finance,* 92d Cong., 1st Sess. 7, 11 (1971). Shortly, thereafter on May 14, 1971, the Committee staff submitted a paper entitled *Foreign Trade—A Survey of Current Issues to be Studied by the Subcommittee on International Trade of the Committee on Finance, United States Senate,* reprinted in *Hearings on World Trade and Investment Issues, supra,* at 887, in which the following was stated (*id.* at 902):

> "The countervailing duty law was written to offset the subsidy effect on such devices as the European rebate of indirect taxes on exports. Yet, the law has not been applied in this area even though couched in mandatory terms. A case has been pending on this issue for over two years before the Treasury Department, which appears unwilling to make a decision. If the laws are not adequate or too harsh they should be changed, rather than left as 'dead letters' on the statute books."

of the Treasury Department's reluctance to be guided by decisions of this Court, and of the consequent need for new legislation, *not amending the substance of the countervailing duty law but providing for time limits and judicial review. Hearings on World Trade and Investment Issues Before the Subcomm. on International Trade of the Senate Comm. on Finance,* 92d Cong., 1st Sess. 109, 110-111. Mr. Wright's remarks were well received by the Subcommittee Chairman, Senator Ribicoff. *Hearings on World Trade and Investment Issues, supra,* at 102. In 1975, when the relevant statutes were amended by the Trade Act of 1974, the very recommendations made by petitioner's Chairman were put into place.[18] For the first time, Congress (1) set a time limit by which the Treasury Department must reach a final determination, so that the Department would be prevented from pursuing its past practice "to stretch out or even shelve countervailing duty investigations for reasons which have nothing to do with the clear and mandatory nature of the countervailing duty law." *S. Rep. No. 93-1298,* 93d Cong., 2d Sess. 183 (1974), and (2) provided for judicial review of negative countervailing duty determinations by American manufacturers, in order "to assure effective protection under the countervailing duty laws to American producers." *Id.* at 185.

The Congress in 1975 did not wish to address itself to *specific* subsidy practices, since it hoped that an international agreement could be negotiated on the use of subsidies and the application of countervail-

[18] Inasmuch as footnote 26 of the majority's opinion below suggests otherwise, it is erroneous. Appendix C, page 79a.

ing duties.[19] *See* 19 U.S.C. § 1303(d) (Supp. V 1975); *H. R. Rep. No. 93-571,* 93d Cong., 1st Sess. 75-76 (1973). In order to foster an atmosphere conducive to fruitful negotiations, Congress even gave *limited* discretionary authority [not invoked herein] to the Secretary of the Treasury not to countervail bounties or grants, under certain well-defined circumstances and subject to close Congressional review. 19 U.S.C. § 1303(d)(2) and (3) (Supp. V 1975).[20] However,

[19] The failure to provide specifically for the assessment of countervailing duties to offset "nonexcessive" indirect tax remissions on exports can hardly be deemed acquiescence in the Treasury Department's practice, or a Congressional effort to decide, by implication, the then pending countervailing duty controversy against the interests of American industry. In fact, the key committee of each chamber of Congress, in reporting on certain amendments to the Antidumping Act of 1921, took pains to state that they were expressing neither approval nor disapproval of the Treasury Department's practice under the countervailing duty law of not countervailing remissions of indirect taxes. *H. R. Rep. No. 93-571,* 93d Cong., 1st Sess. 69 (1973); *S. Rep. No. 93-1298,* 93d Cong., 2d Sess. 172 (1974); *see* discussion in Judge Newman's opinion, Appendix A, pages 27a-29a.

[20] Section 330 of the Executive Branch-sponsored Trade Bill, *H. R. 6767,* 93d Cong., 1st Sess. (1973), gave the Secretary of the Treasury the discretion to refrain from ordering the assessment of countervailing duties if he determined that the imposition of such duties would result or be likely to result in significant detriment to the economic interests of the United States. This proposal was rejected by Congress.

Relying principally on *United States* v. *Hammond Lead Products, Inc.,* 440 F.2d 1024 (C.C.P.A.), *cert. denied,* 404 U.S. 1005 (1971), the Court below misconceived the nature of the Congressional grant of authority to the Secretary of the Treasury under section 303 as being discretionary rather than mandatory. However, as Judge Miller accurately reported in his dissenting opinion, the *Hammond Lead* decision was swiftly and decisively overruled by Congress. *See* Appendix C, pages 107a-111a.

until any international agreement is reached and until the countervailing duty law is further amended, and absent the three specified conditions precedent to the invocation of the discretionary authority in 19 U.S.C. § 1303(d)(2), it was the clear Congressional intention that the countervailing duty law be enforced on the basis of the unambiguous statutory language and the case law construing it, and that American industry be protected from subsidized import competition. *See S. Rep. No. 93-1298,* 93d Cong., 2d Sess. 33-34, 183-188 (1974).

In sum, we submit that the three-judge majority of the Court below reached an erroneous decision on the merits because of its misreading of this Court's decisions, its incorrect inference of Congressional acquiescence in a Treasury Department practice which conflicted with this Court's decisions, and its incorrect attribution to Congress of an intention to confer discretion on the Secretary of the Treasury to define countervailable bounties or grants.

III. The Court of Customs and Patent Appeals, In Directing The Entry Of Summary Judgment For The Respondent, Has So Far Departed From The Accepted And Usual Course Of Judicial Proceedings As To Call For An Exercise Of This Court's Power Of Supervision.

The majority of the Court of Customs and Patent Appeals did *not* decide that the forgiveness of an excise or indirect tax on exportation is not a bounty or grant as a matter of law.[21] Rather, it engaged in a

[21] The majority stated: "Whether the Secretary could, however, under appropriate conditions, change present practice and begin to deem excise tax remission alone a bounty or grant is not before us." Appendix C, page 82a n. 32.

presumption that the Secretary of the Treasury made a determination "that the economic result here is not the conferring of such a benefit, subsidy, or incentive as would rise to the level of a bounty or grant under § 303." Appendix C, page 69a. The majority also stated that "[t]he factual underpinnings of the Secretary's negative countervailing duty determination in this case are not under attack." *Ibid.* Based on these perceptions, the Court proceeded to find that respondent was entitled to summary judgment.

However, as the dissent lucidly demonstrated, the "factual underpinnings" of the Secretary's negative determination "are not under attack, because there are none to attack," [22] and the majority's presumption

Actually, that question was before the Court since the respondent argued that, as a matter of law, remission of excise tax alone is not a bounty or grant.

[22] In paragraph 19 of its Complaint, petitioner alleged: "The exemption or refund of the commodity tax on the exportation from Japan of the subject electronic products constitutes the conferral of an economic benefit upon the manufacture and exportation of the aforesaid products." R. 17. Respondent denied the allegation. R. 22. Each party argued that its position on this point was correct as a matter of law.

Further, in discussing the Treasury Department's reasons for its negative determination in a similar case (remission of value-added taxes by European countries on steel products), former Assistant Secretary of the Treasury, David R. Macdonald made it clear that the determination was based on the Department's precedent (of not countervailing indirect tax remissions while countervailing direct tax remissions) rather than on economic analysis. Press briefing, October 20, 1975; R. 271, 274-275. In fact, Mr. Macdonald candidly admitted that the economic argument of United States Steel Corporation that there should be no distinction between direct and indirect taxes was "quite persuasive", and that "the distinction between so-called 'direct' taxes and so-called 'indirect' taxes, econom-

is rebutted by the record. Appendix C, page 86a. In fact, Treasury Department (and other Executive Branch) determinations have been made that the remission of indirect taxes on exportation is trade distortive and constitutes an export subsidy. *See, e.g.,* opinion of Judge Newman and authorities cited. Appendix A, pages 31a-34a, 37a. *See also Statement by Representative of United States on Border Taxes Before GATT Working Party, April 30, 1968,* reprinted in *Hearings on World Trade and Investment Issues Before the Subcomm. on International Trade of the Senate Comm. on Finance,* 92d Cong., 1st Sess. 1005, 1008, 1010 (1971).

Consequently, summary judgment for respondent could not possibly lie. *See, e.g., Hurtado* v. *United States,* 410 U.S. 578, 587 n. 8 (1973); *Kennedy* v. *Silas Mason Co.,* 334 U.S. 249, 256 (1948). If the Court believed that additional evidence of the "economic result" of the Japanese tax remission was important, it should have remanded the case to the Customs Court.

IV. The Issues Presented Herein Are Of Vital Importance.

The importance of this case extends far beyond the petitioner and far beyond consumer electronic

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ically speaking, may well be chimerical." R. 275. He proceeded to discuss "two ancient Supreme Court cases—*Nicholas* and *Downs* . . . in which the Supreme Court stated that the remission of indirect taxes . . . did, indeed, constitute a bounty or grant," and explained:

> "If the same question were raised before the Supreme Court, *today,* it is our opinion—and this is why we decided the case the way we did—that the Supreme Court would decide the other way, in the light of all of the history and the economic changes that have gone on, up to this time, in a long period of, in essence, acquiescence in the Treasury Department's method of handling this." [R. 276; emphasis in original.]

products. As Judge Newman's opinion stated: "We are confronted with an issue of grave import affecting a broad spectrum of this nation's international trade, as well as a substantial segment of the domestic industry in the United States." [23] Appendix A, page 16a.

The decision of the Court below, if permitted to stand, would constitute judicial cooperation in the Executive's refusal to honor the exercise by the Congress of its constitutional power and duty to regulate foreign commerce by commanding the Executive to offset the trade distortive effect of foreign government intervention in exports to the United States. This Court should act to correct this mischief, concerning which Judge Boe eloquently warned:

> "[I]f a decision of a court shall be predicated on the basis of political and economic expedience and, in so doing, shall ignore judicial precepts and the statutory mandates of the Congress, then assuredly, an erosion of the basic constitutional doctrine of the separation of powers results. The judiciary should not nor cannot serve as the *alter ego* of the Executive or the Congress." [Appendix A, page 38a.]

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[23] *See also* Judge Richardson's observation: "Admittedly, a decision adverse to either party will have certain effects upon domestic industry and labor." Appendix A, page 16a.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 1977

APPENDIX A

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

APPENDIX A

Opinion of the United States Customs Court and Concurring Opinions

(C.D. 4691)

ZENITH RADIO CORPORATION *v.* UNITED STATES

Before RICHARDSON, NEWMAN and BOE, Judges[1]

RICHARDSON, Judge: Plaintiff, a domestic manufacturer of various consumer electronic products,[2] has instituted this action under 19 U.S.C.A., section 1303, for judicial review of the decision of the Secretary of the Treasury, and has moved for summary judgment pursuant to rules 4.12 and 8.2 of the rules of this court; and defendant has cross-moved for summary judgment. Plaintiff contends that the Government of Japan pays or bestows directly or indirectly a bounty or grant upon the exportation from that country of the aforesaid consumer electronic products in the form of the remission of, or exemption from, payment of a consumption tax to which these products would have been subjected had they not been exported. Defendant contends that

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[1] The three-judge panel in this case was designated by the chief judge upon application of defendant pursuant to section 108 of the Customs Courts Act of 1970 (28 U.S.C.A. 255) and rule 4.13 of this court.

[2] Television receivers, radio receivers, radio-phonograph combinations, radio-television-phonograph combinations, radio-tape recorder combinations, record players and phonographs complete with amplifiers and speakers, tape recorders, tape players, and color television picture tubes.

the Japanese tax remission or exemption does not constitute a bounty or grant within the meaning of section 1303.

The essential facts of the controversy are not in dispute. The Japanese Commodity Tax Law, cited as Commodity Tax Law (March 31, 1962, Law No. 48) as revised, is a single-stage consumption tax which is levied usually at the manufacturing level on a fairly extensive list of consumer goods, inclusive of electronic products of the types manufactured by plaintiff. Rates of tax range generally from 5 to 40 percent. Upon exportation of these products from Japan, the tax is either remitted, if previously paid, or the products are exempted from the payment of the tax.[1]

Plaintiff petitioned the Secretary of the Treasury in 1970, alleging that the exemptions from or refund of the so-called "commodity tax" under the aforementioned Japanese Commodity Tax Law when the said electronic products were exported from Japan amounted to the payment or bestowal of bounties or grants directly or indirectly, upon the manufacture, or production in, or exportation from, Japan of said consumer electronic products. The petition asked the Secretary of the Treasury to impose countervailing duties on these imported products in accordance with section 1303. On January 7, 1976, a "Final Negative Countervailing Duty Determination" in the case of "Certain Consumer Electronic Products From Japan" was published in the Federal Register [41 Fed. Reg. 1298] at the instance of the Acting Commissioner of Customs upon the approval of the Acting Assistant Secretary of the Treasury. This determination stated that "a final determination is

[1] Tax exempt status is also accorded to certain other categories of goods, not here pertinent, which are sold domestically to or for schools, other educational institutions and educational use, academic research organs and academic research use, social welfare institutions and persons engaged in social welfare activities, the National Museum, and other persons specified by government ordinance. (Defendant's cross-motion for summary judgment p. 2.)

hereby made in this proceeding, that . . . no bounty or grant is being paid or bestowed, directly or indirectly, within the meaning of section 303, Tariff Act of 1930, as amended (19 U.S.C. 1303), upon the manufacturer [sic], production, or exportation of certain consumer electronic products from Japan."

Plaintiff after giving notice to the Secretary of the Treasury of its intention to contest this determination, which notice was duly published in the Federal Register [41 Fed. Reg. 10235], then instituted this action for a review of this determination in accordance with the provisions of 19 U.S.C.A., section 1516(d), as amended by the Trade Act of 1974. Section 1516(d), as amended, empowers this court to review, at the instance of American manufacturers, producers, or wholesalers, negative countervailing duty determinations made by the Secretary of the Treasury under 19 U.S.C.A., section 1303, relative to the existence of a bounty or grant on merchandise exported to the United States. The motions for summary judgment follow the joining of issue in said action. There is no question here but that the Japanese commodity tax in issue is either remitted when merchandise is exported from Japan if previously paid thereon, or the exported merchandise is not subject to the payment of tax. Plaintiff contends that the forgiveness of the commodity tax on exportation from Japan of the subject electronic products confers a direct or indirect benefit on the exportation of such products. Plaintiff argues:

> . . . The Supreme Court and the special customs tribunals have repeatedly held that the remission of taxes on exportation constitutes the conferral of a bounty or grant within the scope of our countervailing duty law. The legislative history of section 303 of the Tariff Act of 1930, as amended, provides ample support for that position. The forgiveness of the commodity tax on the exportation of the subject electronic products from

Japan is clearly a bounty or grant under section 303, and the Secretary of the Treasury should be required to direct the assessment of countervailing duties to offset the bounty or grant so bestowed. [Brief in support of plaintiff's motion for summary judgment p. 5.]

Defendant contends that the Japanese commodity tax is not a bounty or grant within the meaning of section 1303. Defendant argues among other things:

The historical and legislative background of the countervailing duty statute demonstrates that the countervailing duty provision was intended to cover only the excessive remission of taxes directly related to the imported product. For over 75 years the Treasury Department construed the provision as applying only to such excessive remissions. Since at least 1951, Congress has been well informed of the Treasury's practice and has consistently failed to countermand it even though legislative amendments rendering all tax remissions subject to countervailing duty have been considered. Thus, Congress must be deemed to have approved the administrative interpretation. [Brief in opposition to plaintiff's motion for summary judgment and in support of defendant's cross-motion for summary judgment p. 4.]

Section 1303 reads in relevant part:

(a) Levy of Countervailing Duties.—(1) Whenever any country, dependency, colony, province, or other political subdivision of government, person, partnership, association, cartel, or corporation, shall pay or bestow, directly or indirectly, any bounty or grant upon the manufacture or production or export of any article or merchandise manufactured or produced in such country, dependency, colony, province, or other political subdivision of government, then upon the importation of such article or merchandise into the United

States, whether the same shall be imported directly from the country of production or otherwise, and whether such article or merchandise is imported in the same condition as when exported from the country of production or has been changed in condition by remanufacture or otherwise, there shall be levied and paid, in all such cases, in addition to any duties otherwise imposed, a duty equal to the net amount of such bounty or grant, however the same be paid or bestowed.

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The court agrees with the plaintiff in this case, and concludes that as a matter of law the Japanese commodity tax remission or exemption in issue here constitutes a bounty or grant within the meaning of section 1303. As such, plaintiff's motion for summary judgment is granted and defendant's cross-motion for summary judgment is denied.

Section 1303 has its genesis in section 5 of the Tariff Act of 1897 which reads:

That whenever any country, dependency, or colony shall pay or bestow, directly or indirectly, any bounty or grant upon the exportation of any article or merchandise from such country, dependency, or colony, and such article or merchandise is dutiable under the provisions of this Act, then upon the importation of any such article or merchandise into the United States, whether the same shall be imported directly from the country of production or otherwise, and whether such article or merchandise is imported in the same condition as when exported from the country of production or has been changed in condition by remanufacture or otherwise, there shall be levied and paid, in all such cases, in addition to the duties otherwise imposed by this Act, an additional duty equal to the net amount of such bounty or grant, however the same be paid or bestowed. The net amount of all such bounties or

> grants shall be from time to time ascertained, determined, and declared by the Secretary of the Treasury, who shall make all needful regulations for the identification of such articles and merchandise and for the assessment and collection of such additional duties.

In *Downs* v. *United States,* 187 U.S. 496 (1903), the Supreme Court of the United States held that tax remission is a form of indirect bounty within the meaning of section 5 of the 1897 Act. The *Downs* case involved an elaborate scheme of the Russian Government to control the production and price of sugar. Exporters of sugar were relieved of the ordinary excise tax which would have been payable had the sugar been sold domestically, and additionally, they received marketable certificates of value for their exports. These certificates could be sold to other sugar producers who would then be free to have their surplus sugar reclassified as free sugar and sold in the domestic market without the prohibitive tax burden that would otherwise have accompanied the sale of surplus. The Supreme Court, addressing itself to this scheme stated (p. 515):

> The details of this elaborate procedure for the production, sale, taxation, and exportation of Russian sugar are of much less importance than the two facts which appear clearly through this maze of regulations, viz.: that no sugar is permitted to be sold in Russia that does not pay an excise tax of R. 1.75 per pood and that sugar exported pays no tax at all. . . . When a tax is imposed upon all sugar produced, but is remitted upon all sugar exported, then, by whatever process, or in whatever manner, or under whatever name, it is disguised, it is a bounty upon exportation.

The *Downs* case was cited almost immediately by the Board of General Appraisers for the proposition that tax remission upon exportation constitutes the conferral of a

bounty or grant under the 1897 Act. See *F. W. Myers & Co.* v. *United States,* 6 Treas. Dec. 260, 264-265, T.D. 24306 (1903). It was also cited for the same proposition in *Notes on Tariff Revision* (1908), a 953-page document prepared for the use of the Committee on Ways and Means, U.S. House of Representatives, under the direction of the clerk of the committee, when the Congress was considering revision of the 1897 Tariff Act. Thus, on page 834 of the notes under the heading *Countervailing duty,* the following statement, among others, appears:

> In Downs *v.* United States, 187 U.S., 496 (1903), *it was held that the remission of the excise tax imposed on sugar sold in Russia granted to the exporter of sugar,* which remission is awarded in the form of a certificate having a substantial market value, and the subject of purchase and sale, *is equivalent to a bounty,* and such sugar when imported into the United States is subject to an additional duty equal to the amount of such bounty. [Emphasis added.]

The preface to these notes contains a statement that "That part of the work relating to the interpretation of the law by the courts and by the Board of General Appraisers has been prepared by Thomas J. Doherty, esq., assistant counsel, United States Treasury Department . . . ."

Section 5 of the 1897 Act was reenacted essentially unchanged as section 6 of the 1909 Tariff Act. The words "province or other political subdivision of government" were added, by the 1909 Act, thus broadening the scope of the statute. Hence, reenactment by Congress of the same language in the aftermath of the *Downs* decision and on the representation made to Congress by so eminent an authority on judicial construction as the assistant counsel of the Treasury Department, represents a classical example of congressional ratification of the judicial construction put upon this statutory language. Indeed, this court said as

much in *American Express Company* v. *United States*, 67 Cust. Ct. 141, 150-151, C.D. 4266 (1971), affirmed without reaching this issue, 60 CCPA 86, C.A.D. 1087 (1973), a case involving the construction of section 1303 [prior to amendment by the Trade Act of 1974] as applied to the practice of the Italian Government in its remission of certain internal taxes upon the exportation of transmission tower units to the United States. And inasmuch as this language has been a part of every United States countervailing duty statute dating from 1897, the argument advanced by the Treasury Department that the teaching in *Downs* as to the countervailability of tax remission is *dicta*, is without support.

In this connection, the court notes that defendant advances the argument that Congress did not intend that the scope of section 5 of the 1897 Act should be any different than the predecessor statute was under the 1894 Act when nonexcessive tax remission was expressly excluded from the countervailing duty measure applied to bounty-fed sugar importations (paragraph 182½, Tariff Act of 1894), and that the legislative history indicative of such congressional intent "apparently had not been brought to the attention of the courts in prior cases." [See footnote 12, defendant's brief p. 13.] In other words defendant implies that the courts in *Downs* overlooked congressional limitations on the countervailing duty statute preserved for the 1897 Act from the 1894 Act as manifest in congressional debates.

It is true that the congressional proceedings culminating in section 5 of the 1897 Act were not a part of the record before the courts in *Downs*. Where the language of a statute is clear there is no need to resort to congressional debates to ascertain the intention of Congress. There is no indication that the language in section 5 of the 1897 Act lacked clarity or that it troubled the courts in any way in that case, necessitating resort by the courts to legislative

history. And as for the congressional debates of the measure to which a large portion of defendant's energies have been directed, the Supreme Court had earlier warned against misdirection caused by reliance on remarks made during congressional debates, and as such, the debates would probably not have been considered relevant by the courts in *Downs*, anyway, given the clarity of the language of section 5. In *United States* v. *Trans-Missouri Freight Association*, 166 U.S. 290, 318 (1897), the Supreme Court noted:

> There is, too, a general acquiescence in the doctrine that debates in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body. *United States* v. *Union Pacific Railroad Company*, 91 U.S. 72, 79; *Aldridge* v. *Williams*, 3 How. 9, 24, Taney, Chief Justice; *Mitchell* v. *Great Works Milling & Manufacturing Company*, 2 Story, 648, 653; *Queen* v. *Hertford College*, 3 Q. B. D. 693, 707.
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> The reason is that it is impossible to determine with certainty what construction was put upon an act by the members of a legislative body that passed it by resorting to the speeches of individual members thereof. Those who did not speak may not have agreed with those who did; and those who spoke might differ from each other; the result being that the only proper way to construe a legislative act is from the language used in the act, and, upon occasion, by a resort to the history of the times when it was passed. . . .

But even if congressional debates could have been considered in *Downs*, they would not have changed the results reached by the courts in that case. Paragraph 182½ of the 1894 Act had expressly excepted nonexcessive tax remissions from the specific countervailing duty applicable to bounty-fed sugar imports while recognizing tax remission

to be a form of indirect bounty.[4] And of course, the term "net bounty" as used in the congressional debates on the measure by the 54th Congress clearly referred to the excess over the actual tax remitted. But the term "net amount of . . . bounty or grant" introduced into section 5 of the 1897 Act by the 55th Congress is another matter. Even in the House version of the countervailing duty measure which was passed and sent to the Senate it is to be seen that the House moved significantly away from the strictures of the countervailing duty provision as passed by the 54th Congress, in proposing alternative measures which, if enacted into law would have given the United States the option of countervailing the full bounty or just the excess bounty above the tax remitted. The House version provided that bounty-fed sugar "shall pay, in addition to the foregoing rates, a duty *equal to such bounty, or so much thereof* as may be in excess of any tax collected by such country upon such article, or upon the beet or cane from which it was produced." (Emphasis added.) 30 Cong. Rec. 316 (1897).

On the floor of the House, Representative Adolph Meyer of Louisiana, the center of the cane sugar growing industry in this country, after referring to testimony given in committee hearings by sugar importers at New York called attention to the full bounty provision in the House Bill H.R. 379 as follows (30 Cong. Rec. 317):

> . . . We suggested, wisely, I think, that instead of one-tenth of a cent duty upon bounty sugar imported into this country, the duty ought to be equal to the bounty.

And later on in the same speech Representative Meyer opted for adoption of the full bounty alternative as follows (30 Cong. Rec. 318):

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[4] But even this exemption was conditional, and, not allowed where the requisite certificate was not produced. See T.D. 16641 (1895).

> In view of this selfish and dangerous policy of Germany, it seems to me that we cannot well be too careful in our measures of prevention or too energetic in our countervailing duties. Instead of imposing upon the sugars of bounty-paying countries a tax equal to the excess of such bounty over the tax collected by the country of production upon such exported article, or upon the beet and cane from which it is produced, it would, I think, be far safer to put on and tax the full amount of the bounty that may have been given, and leave to the foreign governments the matter of adjusting their own taxation and bounties. We do not say to them, you shall or shall not impose this tax or this bounty, but we do say that when we find your export bounty or other device enables you to come here and undersell our own people, we will meet you at the shore with a countervailing duty about which there shall be no quibbling or mistake. I may add here that the less the adjustment of the proper duty is complicated by needless questions of computation the simpler will be the duties of the customs collector, and the less opportunity afforded for mistakes or misconduct.

The Senate substituted language for the House version which later became section 5 following the House accession to the Senate amendment. And after the Senate version was introduced through the Senate Finance Committee, the term "net bounty" was never used in the debates that followed in reference to the Senate proposal. On the contrary, the full amount of the German bounty (38 cents on refined sugar or 27 cents on raw sugar per hundred weight) was referred to by the senators as the "export bounty." See, e.g., 30 Cong. Rec. 2204 (remarks of Mr. Gray) (1897); 30 Cong. Rec. 2224 (remarks of Messrs. Caffery, Chandler) (1897); 30 Cong. Rec. 2825 (remarks of Messrs. Jones, Aldrich) (1897).

Since it is clear that the Senate debates indicate an intention on the part of that body of Congress to reach the full amount of the bounty paid under the language it proposed, the term "net amount of . . . bounty . . ." was obviously intended to apply to nothing less than the full amount of the benefit foreign exporters derived from their governments. But the Senate didn't stop here. In addition, it introduced the words "grant" and "bestow" for the first time in the countervailing duty measure. The Senate was fully aware of the new German sugar tax law which was enacted in 1896, and of its increased bounties and burdensome consumption tax which it imposed upon the consumption of sugar by the German people—a burden which drew reactions of disapproval and adverse comment by various senators who participated in the debates. The new consumption tax amounted to approximately $2.16 per pound. However, sugar exported under sugar control was expressly exempt from this tax. Consequently, one need not have been a sugar expert to appreciate that exemption from the consumption tax alone (disproportionately higher than the bounties paid) would continue to stimulate exportation of sugar surplus from Germany *even if the bounties were not paid,* and thus continue to imperil the then incipient U.S. cane sugar production, unless checked by a countervailing duty measure.

Hence, it would appear that the new sugar tax levied by Germany against its people when sugar was consumed in Germany but excused when sugar was exported from Germany became the catalyst which triggered the employment of such sweeping language in the Senate countervailing duty proposal. And the words chosen were eminently appropriate to reach such tax abatement. As the Board of General Appraisers aptly pointed out with respect to the word "grant" in *Downs* (4 Treas. Dec. 405, T.D. 22984 (1901) at page 408) "While it involves the idea of a favor or benefit conferred by the Government, sometimes of an exclusive character, it does not necessarily embrace the act

of appropriating or paying money out of the public treasury. Indeed, the word 'grant,' in its broad signification, may well include the remission of a tax already levied and assessed by the authority of Government." And again, as the Supreme Court said in *Nicholas & Co.* v. *United States,* 249 U.S. 34 (1919) at page 39: "If the word 'bounty' has a limited sense the word 'grant' has not. A word of broader significance than 'grant' could not have been used."

There can be no question then, but that the 55th Congress was faced with a different challenge than that which confronted the 54th Congress, and as a consequence, responded to it with equally different legislation. As stated by the former clerk of the House Committee on Ways and Means in *Notes on Tariff Revision, supra* at page 834 with respect to section 5 of the 1897 Act, "This section was a new departure in tariff legislation . . . ."

There are other contentions advanced by the Government in connection with additional legislation enacted by Congress and international commitments of the United States involving policy decisions which do not supersede the acts of Congress. The court finds that the matters dealt with in these contentions do not temper the mandatory character of the countervailing duty statute in issue or illuminate the congressional intent underlying its enactment.

With respect to the Government's contention concerning the United States' commitment under Article VI(4) of Part II of the GATT,[5] it must be pointed out here that this contention has previously been considered and rejected by the courts. In *American Express Company* v. *United States,*

[5] This provision expressly prohibits contracting parties from levying countervailing duties against each other's products to offset export bounties aiding their exportation where the bounties are in the form of tax remissions or tax exemptions; and the Government maintains that such contractual obligation is binding on the United States.

supra at page 152, this court said with respect to this argument:

> . . . GATT is a trade agreement, which if in conflict with a law of Congress [19 U.S.C.A. § 1303], must yield to the latter.

And our appeals court went even further in that case in regard to this argument when it said [60 CCPA at page 97, footnote 14]:

> That holding finds support not only in the reasoning of the Customs Court that a law of Congress prevails over a trade agreement but also in the fact that the United States undertook Part II of the GATT, which includes Article VI(4), "• • • to the fullest extent not inconsistent with existing legislation." *Protocol of Provisional Application of the GATT,* 61 Stat. A2051 (1947).

Thus, it becomes readily apparent that although our countervailing duty statute [section 1303] speaks in more general terms of *bounties* and *grants* whereas the countervailing duty provision contained in Article VI(4) of Part II of the GATT refers specifically to exemption from or refund of taxes, the GATT's inconsistency "with existing legislation," has been determined by the construction put upon the statutory terms "bounty" and "grant" by the Supreme Court of the United States in *Downs* v. *United States, supra,* in holding that tax abatement or remission comes within the meaning of those terms.

The court does find it somewhat incongruous for defendant, while insisting that Congress did not intend that tax remission be countervailed under section 5 of the 1897 Act and that the Supreme Court did not so construe that statute in *Downs,* to assert in its brief (p. 15): "Of course, when the taxes are not directly related to the imported

product . . . their remission constitutes the bestowal of a bounty or grant upon the exportation of the product."

The defendant represents that it has had a long standing administrative interpretation of the countervailing duty statute which permits it to determine when in its judgment a bounty or grant is excessive and thus should be countervailed. This administrative interpretation is in conflict with the decisions of the Supreme Court of the United States construing the countervailing statute, and must yield.

The Secretary of the Treasury, in administering the countervailing duty statute, must discharge his responsibility in accord with the congressional intent in that statute as interpreted by the Supreme Court of the United States.

The language of section 1303 is abundantly clear, having been construed by the courts in decisions which in turn have been approved by Congress. Generally, the scope of the statute has been held by the courts to be extremely broad; specifically, the statute has been held to embrace remissions of indirect taxes on exportation.

> It is a familiar rule that long-established administrative practice is determinative only when the meaning of the statute is doubtful. *Pittsburgh Plate Glass Co.* v. *United States,* 2 Ct. Cust. Appls. 389, T.D. 32162. . . . Therefore, an administrative practice in plain violation of the terms of the statute cannot be urged as determining the construction that should be given to it. [*United States* v. *Jules Raunheim (Inc.) et al.,* 17 CCPA 425, 431 (1930).]

See also: *Federal Radio Commission* v. *Nelson Bros. Co.,* 289 U.S. 266, 278 (1933); *Federal Power Commission* v. *Pacific Power & Light Co. et al.,* 307 U.S. 156, 160 (1939); *Federal Communications Commission* v. *Pottsville Broadcasting Co.,* 309 U.S. 134, 145 (1940).

Admittedly a decision adverse to either party will have certain effects upon domestic industry and labor. It has been ruled that this court does not have equity jurisdiction, and it would be inappropriate for the court to go beyond the statute governing the issue before it and attempt to balance the equities between industry and labor. Also, if this court were empowered to wade into the uncertain waters of foreign policy it might yield to the tempting protestations of defense counsel and assume the risk of making a determination in this area, but this is an area reserved to the executive and legislative branches of the Government.

The Japanese commodity tax involves the remission of an indirect tax and, as such, is countervailable under section 1303.

Judgment will be entered in accordance with this opinion.

NEWMAN, Judge, concurring: While I join in the opinion of Judge Richardson, which concludes that the remission of the commodity tax on the exportation of the subject Japanese consumer electronic products[1] constitutes the bestowal of a bounty or grant under our countervailing duty law, I add this concurring opinion to that of Judge Boe to elaborate on my views concerning the pivotal issues raised in the briefs of the parties.

We are confronted with an issue of grave import affecting a broad spectrum of this nation's international trade, as well as a substantial segment of the domestic industry in the United States. According to former Assistant Secretary of the Treasury David R. Macdonald, the remission of indirect (viz., consumption) taxes "is a universal practice,

[1] These products include: television receivers, radio receivers, radio-phonograph combinations, radio-television-phonograph combinations, radio-tape recorder combinations, record players and phonographs complete with amplifiers and speakers, tape recorders, tape players, and color television picture tubes.

and one in which this Country engages, also!"[2] Moreover, Japan is one of the most important trade partners of the United States, and indeed is our second largest market for exports. Hence, it is needless to say that the United States has a vital and continuing interest in a harmonious trade relationship with Japan and its exporting community.

The United States has had a general countervailing duty statute since the Tariff Act of 1897,[3] and importers have always been accorded the right to a judicial review of countervailing duty assessments by the Treasury Department. However, it was not until the amendment of section 516 of the Tariff Act of 1930 by sections 321(f)(1) and 331(b) of the Trade Act of 1974, Public Law 93-618 (1975), that American producers could obtain judicial review of a *negative* countervailing duty determination by the Secretary of the Treasury.[4] This civil action is the first

[2] Press briefing on October 20, 1975 by David R. Macdonald, former Assistant Secretary, Enforcement Operations and Tariff Affairs, on rejections of petitions in steel countervailing duty cases; transcript of proceedings, page 9, annexed to plaintiff's reply brief as an exhibit.

[3] Predecessor countervailing duty provisions in the Tariff Acts of 1890 and 1894 were limited in their application to certain sugar imports.

[4] See *United States* v. *Hammond Lead Products, Inc.*, 58 CCPA 129, C.A.D. 1017, 440 F.2d 1024 (1971), *cert. denied* 404 U.S. 1005 (1971), reversing a decision of the Customs Court, First Division, *Hammond Lead Products, Inc.* v. *United States*, 63 Cust. Ct. 316, C.D. 3915, 306 F. Supp. 460 (1969). The appellate court's decision in *Hammond Lead* was nullified by Congress in the 1974 Trade Act amendment to section 516, Tariff Act of 1930. The report of the Ways and Means Committee explains the purpose of the amendment (H.R. Rep. No. 93-571, 93d Cong., 1st Sess. 76 (1973)):

> Section 331(b) of the bill would amend subsections (a), (b), and (c) of section 516 of the Tariff Act of 1930, as amended (19 U.S.C. 1516), to provide for judicial review of negative countervailing duty determinations by the Secretary of the Treasury. The amendment was necessitated by a 1971 decision

presented for decision under the court's expanded jurisdiction under section 516, as amended. In overriding the Secretary's negative determination, and directing the imposition of countervailing duties on the subject Japanese exports, this court is not oblivious to the possible ramifications concerning this country's trade relations with Japan.[5] However, the proper exercise of our judicial function requires that we interpret and apply the law unrestrained by extra-legal considerations more appropriately addressed to legislative policy. Predicated upon the broad, explicit, and mandatory terms of section 303, as amended, the clear intent of Congress and the unequivocal judicial construction of the statute by the Supreme Court, I agree with the conclusion that the commodity tax exemption or rebate on exportation of the involved electronic products from Japan constitutes the payment or bestowal of a bounty or grant subject to countervailing duties.

Legislative History

Defendant heavily relies upon the legislative history of the countervailing duty provisions in the Tariff Acts of 1890, 1894 and 1897, contending such history demonstrates that nonexcessive tax remissions (i.e., refunds or rebates

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of the Court of Customs and Patent Appeals (*United States* v. *Hammond Lead Products, Inc.*, 58 CCPA 129, C.A.D. 1017), which held that judicial review of negative countervailing duty determinations was not available to domestic producers. Your committee is concerned that this decision might adversely affect the ability of American producers to obtain meaningful relief under the countervailing duty law, and believes that the amendment is also warranted, equitably, because American producers have a right to judicial review in the customs courts of other customs determinations involving duty assessments, and importers are entitled to judicial review of the actual assessment of countervailing duties.

[5] In this connection see: Butler, *Countervailing Duties and Export Subsidization: A Re-emerging Issue in International Trade*, 9 Va. J. of Int'l. L. 82, 147-148 (1969).

not exceeding the taxes paid by the producer to the foreign government) were not within the contemplation of Congress, and thus are excluded from the statute.

In the 1890 and 1894 provisions cited by defendant,[6] countervailing duties were applicable only to importations of certain sugar. The 1894 statute contained a proviso which relieved an importer of the countervailing duty if he produced a certificate from the government of the country of exportation to the effect that no indirect bounty was received upon the sugar "in excess of the tax collected upon the beet or cane from which it was produced", and that no direct bounty had been or was to be paid.

Unlike the countervailing duty provisions in the Tariff Acts of 1890 and 1894 (which were applicable only to sugar), section 5 of the Tariff Act of 1897[7] generalized the countervailing duty concept, and made additional duties applicable to all dutiable importations. Further, there was no exception made in the 1897 statute for nonexcessive tax remissions similar to the proviso included in the 1894 sugar schedule provision. This 1897 generalized countervailing duty law was carried over (with certain amendments not pertinent here) into the subsequent Tariff Acts of 1909, 1913, 1922 and 1930.[8]

Predicated upon congressional debates and various fragments of legislative history, defendant strenuously argues that the 1897 countervailing duty provision, although couched in general terms, was principally intended to compensate for the export bounty system employed by Ger-

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[6] Schedule E (sugar schedule), paragraph 237, Tariff Act of 1890, 26 Stat. 567, 584; schedule E (sugar schedule), paragraph 182½, Tariff Act of 1894, 28 Stat. 509, 521.

[7] 30 Stat. 151, 205.

[8] Section 6, Tariff Act of 1909, 36 Stat. 11, 85; paragraph E, Tariff Act of 1913, 38 Stat. 114, 193; section 303, Tariff Act of 1922, 42 Stat. 858, 935; section 303, Tariff Act of 1930, 46 Stat. 590, 687.

many in connection with sugar exports; that Congress was aware that the German government did not collect an internal consumption tax on exported sugar, but nevertheless was concerned only with countervailing the so-called "net bounties" paid to German exporters of sugar, viz., bounties paid in excess of the amount which the exporter was required to pay the German government; that the proviso portion of the 1894 countervailing duty statute shows that the 1897 law was designed only to compensate for the German system of providing for a net bounty; and that the 1897 generalized countervailing duty statute was not intended to change this net bounty concept or to impose a countervailing duty due to the failure of Germany to collect an internal consumption tax on exported sugar.

In short, defendant's position is that the legislative history of the 1894 and 1897 countervailing duty provisions shows that an excessive tax remission directly related to the exported product was the type of indirect bounty or grant which was of principal concern to Congress; and that in utilizing the term "net amount" in section 5 of the 1897 Act, Congress intended thereby to express and incorporate the excessive refund concept of the proviso contained in paragraph 182½ of the 1894 statute.

I see nothing in the legislative history relied upon by defendant which is persuasive that by using the term "net amount" in the generalized 1897 countervailing duty provision Congress intended to continue the exception in the proviso of the 1894 law for nonexcessive tax remissions. While the legislative history cited by defendant indicates that sugar bounties paid by Germany were of major concern to Congress when the bill which became the Tariff Act of 1897 was debated, Congress nevertheless generalized the countervailing duty provision so that it was no longer specifically addressed to importations of sugar (or any other product) nor specifically addressed to indirect bounties in the form of excessive tax remissions. Looking at the new

broad and inclusive language of the 1897 statute as a whole, Congress encompassed therein *all* dutiable products,[9] and *any* bounty or grant, direct or indirect, however the same be paid or bestowed, with duties to be assessed *"in all such cases"*. Accordingly, I am not persuaded that by merely inserting the term "net amount" in the 1897 statute Congress intended to resurrect the proviso in the 1894 sugar schedule provision or to exclude indirect bounties in the form of a tax exemption or "nonexcessive" rebate.

JUDICIAL CONSTRUCTION

In *United States* v. *Passavant*, 169 U.S. 16 (1898), the effect of a tax rebate on the dutiable value of certain goods exported from Germany was considered by the Supreme Court. Although countervailing duties were not involved in the case, Chief Justice Fuller's economic analysis of the German tax rebate scheme is illuminating (169 U.S. at 22-23):

> The certificate of facts states that the German duty is imposed on merchandise when "sold by the manufacturers thereof for consumption or sale in the markets of Germany;" and "is collected when the finished product goes into consumption in Germany." As the tax accrues when the manufacturer sells, his wholesale price includes it, and the purchaser who buys these cotton velvets in wholesale quantities in the German markets pays a price covering the tax, and that is the price for the merchandise when bought and sold in those markets.
>
> *Doubtless, to encourage exportation and the introduction of German goods into other markets, the German government could remit, or refund the tax, pay a bonus, or allow a drawback.*

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[9] Section 331 of the Trade Act of 1974 made the countervailing duty law applicable, under certain circumstances, to duty-free imports for the first time in the law's history.

And it is found that in respect of these goods when "purchased in bond, or consigned while in bond, for exportation to a foreign country, this duty is remitted by the German government, and is called 'bonification of tax,' as distinguished from being refunded as a rebate." The use of the word "bonification" does not change the character of this remission. *It is a special advantage extended by government in aid of manufactures and trade, having the same effect as a bonus or drawback. To use one of the definitions of drawback, it is "a device resorted to for enabling a commodity affected by taxes to be exported and sold in the foreign market on the same terms as if it had not been taxed at all."* [Emphasis added.]

Passavant was cited by the Supreme Court in two landmark decisions construing the scope of the 1897 general countervailing duty statute, which is the progenitor of section 303, as amended: *Downs* v. *United States,* 187 U.S. 496 (1903); and *Nicholas & Co.* v. *United States,* 249 U.S. 34 (1919). These decisions have been discussed in the opinions of my colleagues, and it is unnecessary to further elaborate upon them here. Suffice it to state that the Supreme Court has unequivocally enunciated that the rebate or remission of a tax on exported products where such taxes have been imposed on a domestic sale in the country of exportation constitutes a bounty or grant under the countervailing duty statute.[10] Defendant, on the

[10] The *Downs* and *Nicholas* decisions have been cited and followed by the Customs Court in two countervailing duty cases involving tax remission schemes: *Hammond Lead Products, Inc.* v. *United States, supra,* 63 Cust. Ct. 316, *rev'd on jurisdictional grounds, United States* v. *Hammond Lead Products, Inc., supra,* 58 CCPA 129, *cert. denied* 404 U.S. 1005 (1971); and *American Express Company* v. *United States,* 67 Cust. Ct. 141, C.D. 4266 (1971), *aff'd on other grounds,* 60 CCPA 86, C.A.D. 1087, 472 F.2d 1050 (1973).

other hand, is unable to cite any decision which holds that a nonexcessive tax remission upon exportation is not a bounty or grant under the statute.

After the *Downs* decision, the countervailing duty provision was periodically reenacted by Congress, but was never amended to except tax remissions from its ambit. Fundamentally, such repeated reenactments without excepting tax remissions is significantly indicative of a congressional intent to approve the judicial construction of the countervailing duty statute. *United States* v. *D. H. Grant & Co., Inc.,* 47 CCPA 20, C.A.D. 723 (1959); *United States* v. *Loffredo Bros.,* 46 CCPA 63, C.A.D. 697 (1958); *United States* v. *Astra Trading Corp.,* 44 CCPA 8, C.A.D. 627 (1956).

Administrative Practice

Citing a number of published decisions of the Secretary of the Treasury dating back to 1898[11] and other official actions, defendant contends that "the Department of the Treasury has consistently and uniformly interpreted the countervailing duty statute from its inception as not including within the terms 'bounty or grant' a remission or refund of taxes which does not exceed the taxes actually imposed."[12] Further, defendant asserts that Congress has

[11] T.D. 19321, 1 Synopsis of Dec. 696 (1898); T.D. 19729, 2 Synopsis of Dec. 157 (1898); T.D. 20407, 2 Synopsis of Dec. 996 (1898); T.D. 34466, 26 Treas. Dec. 825 (1914); T.D. 42895, 54 Treas. Dec. 101 (1928); T.D. 43634, 56 Treas. Dec. 342 (1929); T.D. 49355, 73 Treas. Dec. 107 (1938).

Respecting "long-established administrative practice" as it bears on the construction of tariff laws, see Judge Lane's opinion in *Commonwealth Oil Refining Company* v. *United States, United States* v. *Commonwealth Oil Refining Company,* 60 CCPA 162, C.A.D. 1105, 480 F.2d 1352 (1973).

[12] In *Executive Branch GATT Studies,* Senate Committee on Finance, 93d Cong., 2d Sess. (1974), Congress was informed (pages 11-12):

been well informed concerning Treasury's practice since at least 1951, and therefore "must be deemed to have approved the administrative interpretation of the countervailing duty statute".

Plaintiff does not dispute the existence of the administrative practice relied on by defendant, but urges that the administrative interpretation is entitled to no weight in view of *Downs* and *Nicholas*. Plaintiff also denies any congressional approval of the Treasury's practice.

I find defendant's reliance upon its administrative construction and the asserted congressional ratification thereof to be misplaced in the instant case for the following reasons:

Under administrative precedents dating back to 1897, the Treasury Department has generally not construed the rebate, remission or exemption on exports of ordinary indirect taxes (consumption taxes on goods) to be a "bounty or grant" within the meaning of our countervailing duty statute (Section 303, Tariff Act of 1930; 19 U.S.C.A. 1303). These precedents have been applied as a general rule with regard to all consumption taxes on goods. The precedents are based on the principle that, since exports are not consumed in the country of production, they should not be subject to consumption taxes in that country. The theory has been that the application of countervailing duties to the rebate of consumption taxes would have the effect of double taxation of the product, since the United States would not only impose its own indirect taxes, such as Federal and state excise taxes and state and local sales taxes, but would also collect, through the use of the countervailing duty, the indirect tax imposed by the exporting country on domestically consumed goods.

The Treasury Department has not applied these precedents to tax "rebates" in excess of taxes collected on the exported product. If, for example, the foreign exporter has paid $1 in excise taxes on a product he exports to the United States but receives a rebate of $1.20 on exportation, under long-established administrative precedents of the Treasury Department the imported merchandise would be subject to a countervailing duty of $0.20.

First, the Treasury's administrative practice has been, and presently is, in direct conflict with the teachings of *Downs* and *Nicholas*. Fundamentally, where decisions of the Supreme Court and an administrative practice are in conflict, it is the decisions rather than the practice which Congress must be presumed to have ratified when reenacting the statute. *Cf. Atalanta Trading Corp.* v. *United States,* 32 Cust. Ct. 19, C.D. 1574, *aff'd* 42 CCPA 90, C.A.D. 577 (1954); *United States* v. *Douglas & Berry,* 6 Ct. Cust. Appls. 100, T.D. 35342 (1915). See also: *United States* v. *Bassichis Co.,* 16 Ct. Cust. Appls. 410, T.D. 43133 (1928) (legislative approval of judicial interpretation and administrative practice distinguished).

Second, when Congress considered the proposed Customs Simplification Acts of 1950 (H.R. 8304, 81st Cong., 2d Sess.) and 1951 (H.R. 1535, 82d Cong., 1st Sess.),[13] the Treasury Department attempted to persuade Congress to amend the countervailing duty law to provide that the exemption or refund of taxes on goods exported to the United States would not be countervailable. The Department's proposed legislation provided as follows:

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> (c) • • • The exemption of any exported article or merchandise from a duty or tax imposed on like articles or merchandise when destined for consumption in the country of origin or exportation, or the refunding of such a duty or tax, shall not be deemed to constitute a payment or bestowal of a bounty or grant within the meaning of this section.

The purpose of the proposed amendment and Treasury's rationale in seeking an amendment of the countervailing

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[13] H.R. 1535 was replaced by H.R. 5505, 82d Cong., 1st Sess. (1951).

duty statute were expressed in the Department's analyses, which reported the following (*Analysis of Customs Simplification Act of 1950,* 5; *Analysis of the Customs Simplification Act of 1951,* 5):

> • • • Subsection (c) would also add a provision that countervailing duty shall not be levied because of the ordinary remission or refund of taxes and duties allowed on exportation by most nations, including the United States. Under the existing administrative interpretation of section 303 of the Tariff Act, countervailing duty is not imposed in such situations, but some judicial comments on the statutes do not make it clear that the courts would consider such duty or tax exemptions as outside the scope of the countervailing duty provision. The proposed amendment eliminates the possibility of rulings in conflict with the administrative practice which has been followed for over 50 years.

Congress carefully considered, but rejected the Treasury's proposed amendment, despite the Department's statement that the proposed amendment would conform the countervailing duty statute to the administrative interpretation and practice.[14] It is apparent, then, that Congress could have, but declined to, nullify the Supreme Court's interpretation of the countervailing duty statute insofar as tax remissions are concerned. A reasonable conclusion from the congressional rejection of the Treasury's proposed amendments in 1950 and 1951 is that Congress was satisfied with the way it had earlier written the statute, and approved of the Supreme Court's construction of the law.

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[14] Treasury's proposal to amend the countervailing duty statute to require a finding of injury, so as to conform our statute with the GATT rule on countervailing duties, was similarly rejected.

Third, when Congress was considering what was to become the Trade Act of 1974, Public Law 93-618 (1975), Treasury's practice under section 303 of applying a "directly related" test to tax remissions was brought to Congress' attention. The executive branch proposed an amendment to section 203 of the Antidumping Act of 1921, 19 U.S.C. § 162 (purchase price),[15] and explained its purpose as follows (Committee on Ways and Means, U.S. House of Representatives, *Press Release and Other Material Relating to the Administration Proposal Entitled the "Trade Reform Act of 1973" Transmitted to the Congress on April 10, 1973,* 93d Cong., 1st Sess. 89-90 (1973)):

> The second amendment deals with the treatment of certain types of tax rebates in computing purchase price. The amendment would conform the standard in the Antidumping Act to the standard under the countervailing duty law, thereby harmonizing tax treatment under the two statutes. With the amendment, no adjustment to the advantage of the foreign exporter would be permitted for indirect tax rebates unless the direct relationship of the tax to the product being exported, or components thereof, could be demonstrated.
>
> The Treasury Department considers rebates or remissions of taxes not directly related to an exported product or its components as being bounties or grants within the meaning of the countervailing duty law. Under the Antidumping Act, Treasury is required in its calculation of purchase price to add back to the

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[15] "It should be kept in mind that the Countervailing Duty Law and the Antidumping Statute are opposite sides of the coin. The former deals with subsidized imports entering this country; the latter deals with imports being sold at less than fair value in this country (meaning imports that are sold here at less than they are sold for in the country of export)." King, *Countervailing Duties—An Old Remedy with New Appeal,* 24 Bus. Law. 1179, 1181 (1969).

price at which merchandise is sold to the United States "the amount of any taxes imposed in the country of exportation upon the manufacturer, producer, or seller, in respect to the manufacture, production, or sale of the merchandise, which have been rebated, or which have not been collected, by reason of the exportation of the merchandise to the United States." The "adding back" of such taxes under the Antidumping Act would have the effect of reducing or eliminating any dumping margins that may exist. The language of the Antidumping Act "in respect to the manufacture, production or sale of the merchandise" is somewhat broader than the standard applied to tax rebates under the countervailing duty law (directly related to the exported product or its components) and could result in inconsistency of treatment of tax rebates under the two laws.

Although Congress adopted the proposed amendment to section 203 of the Antidumping Act (see section 321 of the Trade Act of 1974), significantly the House Ways and Means Committee pointed out (H.R. Rep. No. 93-571, 93d Cong., 1st Sess. 69 (1973)):

> • • • The amendment would conform the standard in the Antidumping Act to the standard under the countervailing duty law, thereby harmonizing tax treatment under the two statutes. However, your committee, in recommending this amendment, does not express approval or disapproval of the standard employed by the Treasury Department in administering the countervailing duty law with regard to the treatment under that law of rebates or remissions of direct and indirect taxes.

The Senate Finance Committee adopted a similar stance in its report (S. Rep. No. 93-1298, 93d Cong., 2d Sess. 172 (1974)):

> • • • The standard in the proposed amendment parallels that standard employed by the Treasury Department under the countervailing duty law in determining whether tax rebates and remissions constitute bounties or grants. However the Committee, in recommending this amendment, does not express approval or disapproval of that Treasury practice.

Consequently, the short of the matter is that Congress has not ratified the Treasury's practice under the countervailing duty law.

International Understanding

Pursuant to Article VI(4) of the General Agreement on Tariffs and Trade (GATT), the imposition of countervailing duties is prohibited "by reason of the exemption of such product from duties or taxes borne by the like product when destined for consumption in the country of origin or exportation, or by reason of the refund of such duties or taxes."[18] The effect of Article VI(4) of the GATT is that the rebate or remission of indirect taxes (i.e., consumption taxes) is exempted from countervailing duties, whereas the remission or rebate of direct taxes (i.e., income taxes) is subject to countervailing duties. See: Marks and Malmgren, *Negotiating Nontariff Distortions to Trade*, 7 Law & Pol. Int'l Bus. 327, 351 (1975); King, *Countervailing Duties—An Old Remedy With New Appeal*, 24 Bus. Law. 1179, 1185-86 (1969).

Defendant urges that "[a] construction of the term 'bounty or grant' so as to exclude the remission of the

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[18] Also, Ad Article XVI of Annex I, added to the GATT in 1955, further clarifies the rule as follows: "The exemption of an exported product from duties or taxes borne by the like product when destined for domestic consumption, or the remission of such duties or taxes in amounts not in excess of those which have accrued, shall not be deemed to be a subsidy".

Japanese commodity tax is consistent with international understandings".

When the United States and other signatories acceded to GATT, they agreed to undertake Part II thereof (which includes Article VI(4)) "• • • to the fullest extent *not inconsistent with existing legislation*". (Emphasis added.) *Protocol of Provisional Application of the GATT*, 61 Stat. A2051 (1947).[17] Unlike the GATT our countervailing duty law contains no exception for exemptions from or rebates of taxes—direct or indirect. Therefore, Article VI(4) of the GATT is inconsistent with the preexisting countervailing duty law, and must yield to the statute. Moreover, GATT could not in any event modify or rescind an existing act of Congress (viz., section 303), as Congress never delegated any authority to the executive branch to amend the countervailing duty law. See *American Express Company* v. *United States*, 67 Cust. Ct. 141, 152, C.D. 4266 (1971), *aff'd* 60 CCPA 86, 97 (footnote 14), C.A.D. 1087, 472 F.2d 1050 (1973).

Additionally, it is noted that economists and legal commentators have increasingly challenged the economic underpinnings for the administrative adherence to the distinction between remissions of direct and indirect taxes. The administrative policy distinguishing between remissions of direct and indirect taxes is explained by defendant in its brief in opposition to plaintiff's motion (pages 41-42):

> The non-countervailing of non-excessive remissions of taxes directly related to the imported product is based on the principle that since exports are not consumed in the country of production, they should not be subject to consumption taxes in the country of production. This leaves the importing country free to

[17] This provision is commonly referred to as the "grandfather clause".

> impose its taxes on the imported merchandise. Otherwise, the same goods would be subject to double taxation on its consumption, first in the manufacturing country, then in the importing country. The different treatment of different types of taxes rests further on the long-standing assumption that certain so-called indirect taxes (those levied directly on the sale of products, such as excise, sales, and turnover taxes and only indirectly on income or profits) are shifted forward to the ultimate consumer, while so-called direct taxes (those levied directly on income or profit rather than on products) are absorbed by the producer, i.e., are shifted backward and do not affect the price of the product sold to the consumer. The general assumption, in international trade treatment, is that the indirect taxes (which affect the sales price) should be levied in the country of sale of the product while the direct taxes (which do not affect the sales price) should be levied in the country where the product is produced. [Footnote omitted.] By the same token, it is the almost universal assumption that the exemption of an article from a general consumption tax in the country of manufacture gives no incentive to the manufacturer to seek the foreign market as opposed to the domestic.

It is emphasized that the foregoing quotation is accepted as an explanation of Treasury's position but not as a justification.

In a paper for the Twenty-First Annual Conference of the Canadian Tax Foundation, Toronto, November 20, 1968, former Assistant Secretary of the Treasury John R. Petty stated:[18]

[18] A copy of this paper was submitted as an exhibit annexed to plaintiff's reply brief.

> Modern economic theory suggests that the distinction implicit in the GATT treatment of direct and indirect taxes is an extreme and arbitrary assumption which does not stand the test of economic reality. While economists and businessmen may disagree on the extent of the forward shifting of indirect and direct taxes, they do agree that the extreme assumptions which are necessary to make the present GATT rules trade neutral are an inadequate approximation of reality. Therefore, a border adjustment equivalent to the full internal indirect tax tends to stimulate exports and provide protection against imports. In brief, the present provisions of GATT divert trade and thereby disadvantage countries such as the United States and Canada which rely primarily on direct taxes. [Footnotes omitted.]

Marks and Malmgren, in their article cited *supra*, commented (7 Law & Pol. Int'l Bus. at 351):

> Under GATT Article VI(4), any rebates, upon exportation, of direct taxes, e.g., income and social security taxes, are impliedly countervailable, while rebates of indirect taxes are not countervailable. The Treasury, in its administrative actions, has followed the GATT rules. The GATT distinction between rebates of direct and indirect taxes was established at a time when most economists made the working assumption that indirect taxes are fully passed on to the consumer, while direct taxes are not. Following this rationale, the GATT, with the concurrence and drafting assistance of the U.S. negotiators, provided for different treatment of rebates of direct, as contrasted with indirect, taxes.
>
> Most economists now appear to be more cautious in accepting this working assumption. There seems little doubt that indirect taxes frequently are not passed fully through to the consumer, while direct taxes often are partially or fully passed on. The incidence of taxation often depends on whether there exists a buyers' or sellers' market, expressed by the relative elasticity of demand or supply of the product under consideration, rather than whether the tax is direct or indirect. No definitive quantitative study has been found describing the extent to which direct and indirect taxes are, or are not, passed through. [Footnotes omitted.]

See also: *The Michelin Decision: A Possible New Direction for U.S. Countervailing Duty Law*, 6 Law & Pol. Int'l Bus. 237, 246-47 (1974); Rosendahl, *Border Tax Adjustments: Problems and Proposals*, 2 Law & Pol. Int'l Bus. 85, 88-98 (1970); Feller, *Mutiny Against the Bounty: An Examination of Subsidies, Border Tax Adjustments and the Resurgence of the Countervailing Duty Law*, 1 Law & Pol. Int'l Bus. 17, 50-54 (1969); *The United States Submission on Border Tax Adjustments*, February 16, 1966, to Working Party No. 4 of the Council on Border Tax Adjustments, Organization for Economic Co-operation and Development (copy annexed to plaintiff's reply brief as an exhibit); King, *Countervailing Duties—An Old Remedy with New Appeal*, *supra*, at 1188-90.

Indeed, the Treasury Department itself has publicly conceded that no distinction should be made between remissions of direct and indirect taxes in enforcement of the countervailing duty law. At a press briefing in connection with the rejection of countervailing duty petitions filed by United States Steel Corporation, former Assistant Secretary of the Treasury Macdonald stated that in determining whether there is a "subsidy" on export due to the remission of the value-added tax "[t]here is a distinction, in this area, that has been adopted and maintained by the Treasury Department, and that is reflected in the GATT —in our General Agreement on Tariff and Trade—between

'direct' taxes and 'indirect' taxes". Continuing, Mr. Macdonald stated:

> The Treasury Department has consistently followed this distinction and has, in the past, countervailed against the remission of *direct* taxes.
>
> Okay. Having made that distinction, I just want to make this additional point: The fact that we have not found the remission of value-added taxes to be a bounty or grant within the meaning of our law, does not mean that the United States Government is wild about other taxes of this sort. In fact, if there was one thing that was quite persuasive in the petition filed by U.S. Steel, it was their economic argument that, *in fact, there should be no distinction between direct and indirect taxes.*
>
> We believe that, while we are making this decision in consonance with our prior precedents—we believe that this is a subject which requires very serious negotiations because *the distinction between so-called "direct" taxes and so-called "indirect" taxes, economically speaking, may well be chimerical.* [Emphasis added in part.]
>
> Okay. Any questions?
>
> • • • • • • •
>
> MEMBER OF THE PRESS: Is the Treasury now tinkering with changing the direct and indirect [tax distinction], and considering it as one?
>
> SECRETARY MACDONALD: I think it is fair to say that the United States Government is in favor of changing it.[19]

In sum, I have determined that the direct-indirect tax dichotomy (and the discredited underlying tax shifting assumptions) upon which the Treasury's administration of the countervailing duty law has been premised has no economic or legal justification.

[19] Transcript of press briefing, *op. cit.*, at 3-4, 7.

NONEXISTENCE OF GENUINE ISSUE OF FACT CONCERNING ECONOMIC BENEFITS OF TAX REBATING TO JAPANESE EXPORTERS

Finally, defendant contends there is a genuine issue of fact precluding summary judgment concerning certain economic benefits of the tax remission to the Japanese exporters.

Zenith's complaint alleges that the tax exemption and rebate of the commodity tax confer economic benefits on the Japanese exporters of the subject electronic products. Delineating this allegation more specifically in its brief, plaintiff asserts that due to the tax exemption and rebate of the commodity tax, Japanese exporters "have been able to sell in the United States market at a price lower than that at which they can sell in Japan or at a price that would assure a greater profit than could be earned in Japan", and the exporters "have been able to direct their products to new markets".

In its answer, defendant denies that the tax exemption and rebate results in an economic benefit to the Japanese manufacturers, and in its brief argues that "to the extent plaintiff's above-noted contentions have any relevance, plaintiff has failed to produce the necessary proof, not to mention demonstrating the absence of a genuine issue of fact between the parties". Defendant's brief also states that plaintiff's contention "assumes that the taxes which are levied directly on the product are not shifted forward to the ultimate consumer, contrary to the long-standing assumptions". According to defendant, "[p]laintiff's view assumes that the producer absorbes [*sic*] some of the tax when he sells at home. When the tax is remitted, according to the plaintiff, the producer need not absorb a portion of

the tax and due to this fact may reduce his price (or increase his profit) by the amount of the tax absorbed in the home market".

I have concluded that no triable issue of fact exists in this case. Plainly, when exports are relieved of a domestic consumption tax burden which would otherwise be imposed if the goods were sold in the home market, a bounty or grant, as those terms were construed in *Downs* and *Nicholas*, is bestowed on the exporter as a matter of law. Thus, in *Downs*, the Supreme Court stated (187 U.S. at 513):

> • • • But, if a preference be given to merchandise exported over that sold in the home market, by the remission of an excise tax, the effect would be the same as if all such merchandise were taxed, and a drawback repaid to the manufacturer upon so much as he exported. • • •

And, in *Nicholas*, the Court commented (249 U.S. at 37):

> Looking only at the [countervailing duty] paragraph and judging from the first impressions of its words, the problem presented would seem to be without difficulty. There is paid to an exporter of spirits from the United Kingdom the sum of three or five pence a gallon, as the case may be, and the instant conclusion is that *the sale of spirits to other countries is relieved from a burden that their sale in the United Kingdom must bear. There is a benefit, therefore, in exportation, an inducement to seek the foreign market.* And thus it would seem, if we regarded the substance of things, that the condition of the application of Paragraph E obtains. [Emphasis added.]

Although the Supreme Court has not had occasion to construe the countervailing duty statute since *Downs* and *Nicholas*, the economic and legal rationale of those cases remain viable today. There can be no question but that the

rebate or remission of a tax on products exported, where such taxes would have been imposed on a domestic sale in the country of exportation, constitutes a subsidy to the exporter, providing him "an inducement to seek the foreign market". *Nicholas, supra.* And it was precisely such a subsidy that Congress intended should be construed as a bounty or grant subject to the imposition of countervailing duties under our statute.

Further, as noted *supra*, the assumption invoked by the Treasury Department that indirect taxes are fully shifted forward to the ultimate consumer has been shown to be arbitrary and unrealistic. Hence, in *The United States Submission on Border Tax Adjustments*, February 16, 1966, to Working Party No. 4 of the Council on Border Tax Adjustments, Organization for Economic Co-operation and Development (copy annexed to plaintiff's reply brief as an exhibit), it is noted that indirect taxes do not shift fully forward into the price of products (pages 2-3):

> • • • the imposition of excise taxes and sales taxes are considered to be no different from increases in other kinds of costs. The domestic price of the product is increased to some extent by the tax (although only in exceptional cases such as cigarettes does it verge on an increase equal to the full amount of the tax) and in most cases reduces the quantity of the product demanded in the domestic market. *The price net of tax therefore is lower, and a border tax adjustment involving a full refund of the tax to the exporter makes export sales relatively more profitable than before, thereby acting as an incentive to export the taxed commodity.* [Emphasis added in part.]

Conclusion

For the reasons presented herein, I am clear that as a matter of law the remission of the Japanese commodity tax on the subject electronic products constitutes a bounty or

grant under section 303, as amended. Accordingly, I join my distinguished colleagues in granting plaintiff's motion for summary judgment.

Boe, Judge, concurring: I concur in the well-reasoned opinion of Judge Scovel Richardson. In so doing, however, I feel constrained to comment with further particularity on certain contentions of the defendant in support of the negative determination of the Secretary of the Treasury involved in the instant cause of action.

The defendant warns that a determination by this court that the remission of the Japanese commodity tax on the exports in question constitutes a bounty or grant would have a disastrous effect upon the political and economic policies and relationships of this country. In this connection I cannot refrain from observing that the courts are urged with increased frequency to resolve their determinations in the light of prophesied economic or political crises, notwithstanding judicial rationale or statutory construction to the contrary. Indeed, the resolution of any cause of action by a court must necessarily include a consideration of all facts and information which may have an appropriate and relevant bearing on the ultimate determination. However, if a decision of a court shall be predicated on the basis of political and economic expedience and, in so doing, shall ignore judicial precepts and the statutory mandates of the Congress, then assuredly, an erosion of the basic constitutional doctrine of the separation of powers results. The judiciary should not nor cannot serve as the *alter ego* of the Executive or the Congress.

In seeking affirmation by this court of the administrative determination by the Secretary of the Treasury finding that the remission of the Japanese commodity tax on the merchandise in question destined for exportation to the United States does not constitute a bounty or grant, the defendant appears to rest its argument on two principal contentions:

(1) The legislative history relating to the adoption of the Tariff Acts of 1890, 1894 and 1897 evidences an intent on the part of Congress to exclude the remission of an indirect excise tax by a foreign nation upon exports from the provisions of our countervailing duty statute, and

(2) The omission on the part of Congress to enact legislation altering or repudiating the administrative interpretation of our countervailing duty statute constitutes a legislative approval and sanction of the Treasury Department interpretation.

I

I am unable to concur in the contention of the defendant that the legislative history of the congressional action relating to the Tariff Acts of 1890, 1894 and 1897 serves to reflect the intent of Congress to exclude the remission of an indirect excise tax from the classification of a bounty or grant under our present countervailing duty statute. The remarks by members of Congress while in floor debate, referred to in defendant's briefs, give scant legal justification to the administrative interpretation adopted and presently urged by the Treasury Department. The colloquy engaged in by the members of Congress rather would appear to emphasize the dubious familiarity and understanding on their part with respect not only to the provisions of the German Sugar Act in question, but the specific legislation under their immediate consideration. To adopt an interpretation of our countervailing duty statute upon a presumed legislative intent predicated upon the apparent limited and conflicting understanding evidenced by statements then made by some of the members of Congress, indeed, would do violence to the rules of statutory construction.

No more clear, concise or unambiguous definition of the terms "bounty" or "grant," first included in the countervailing duty provisions of the Tariff Act of 1897 and in all

subsequent countervailing duty statutes enacted thereafter, can be given than the meaning expressed by the Court in *Downs* v. *United States,* 187 U.S. 496 (1903) at 515:

> When a tax is imposed upon all sugar produced, but is remitted upon all sugar exported, then, by whatever process, or in whatever manner, or under whatever name it is disguised, it is a bounty upon exportation.

In like manner, the Court therein has clearly indicated that in construing what may constitute a "bounty" or "grant," no distinction lies between a direct and an indirect tax, nor that a distinction lies between a remission of a tax and a direct payment or subsidy (at 502):

> *A bounty may be direct,* as where a certain amount is paid upon the production or exportation of particular articles, of which the act of Congress of 1890, allowing a bounty upon the production of sugar, and Rev. Stat. sections 3015-3027, allowing a drawback upon certain articles exported, are examples; *or indirect, by the remission of taxes* upon the exportation of articles which are subjected to a tax when sold or consumed in the country of their production, of which our laws, permitting distillers of spirits to export the same without payment of an internal revenue tax or other burden, is an example. *United States* v. *Passavant,* 169 U.S. 16. [Emphasis supplied.]

The import of the foregoing quotations cannot be disclaimed by terming the same to be dicta.

The defendant, however, further urges that the term "net amount" of a bounty, as first used in the Tariff Act of 1897 and thereafter in all subsequent countervailing duty statutes, must be construed conceptually and in point of time with the provisions of the prior Tariff Acts of 1890 and 1894. This contention likewise is based principally upon the exchange between the members of the Congress in floor

debates and discussions with respect to the prior Tariff Acts of 1890 and 1894 as well as the Tariff Act of 1897 then under consideration, and the respective relationship of these acts to sugar acts of foreign nations, principally Germany. From this premise the government contends that the term "net amount," *per se,* excludes the remission of a nonexcessive excise tax from the purview of our countervailing duty statute. No explanation or legislative intent other than the hypothesis of the defendant appears to have been offered with respect to the term "net amount," first incorporated as a part of the countervailing duty provision of the Tariff Act of 1897 and included all countervailing duty statutes enacted subsequent thereto.

The intent of the Congress in the use of the term "net amount" may be understood more readily when viewed in light of the economic and legislative history relating to the German sugar industry during the last decade of the nineteenth century. Throughout this period sugar exports increased greatly, occasioned in large measure by the payment of government bounties. Accordingly, complicated mechanisms to control the bounties paid to sugar exporters on the one hand and to alleviate the resulting economic burden thrust upon the domestic consumer were initiated, modified and amended by successive German tax laws.[1]

A reoccurring burden necessarily fell upon the Congress to enact legislation providing for countervailing duties at specific rates to "keep pace" with the rapidly changing German tax laws and procedures and the fluctuating boun-

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[1] In 1894 and 1895, sugar exports were reported to have constituted 72% of the total German production. In a single year more than $30,000,000 was paid as bounties to sugar exporters from German internal sugar tax revenues totaling more than $40,000,000. German internal revenue taxes were amended or new taxes enacted in 1887, 1892, 1893, and 1896. *Reciprocity,* J. Laurence Laughlin, Ph.D. and H. Parker Willis, Ph.D. (New York: The Baker & Taylor Co., 1903).

ties occasioned thereby. The need for a countervailing duty statute unrestricted by a specific percentage amount and sufficiently elastic in determination to effect the regulation of any exports from any foreign country was clearly evident.

The Tariff Act of 1897 provided the first countervailing duty provisions of general application. This statute is characterized by a language far more broad and inclusive than the language contained in the Tariff Act of 1890 and 1894 in which the countervailing duty provisions were directed solely to sugar exported from countries which continued, in turn, to enact involved and intricate tax mechanisms in connection with their domestic production and consumption of this commodity as contrasted with the exportation thereof. The Act expanded the scope of the Tariff Act of 1894 by specifically deleting the provision of that Act which limited the application of the statute to excessive tax remissions only. As Judge Richardson appropriately noted in *American Express Company* v. *United States,* 67 Cust. Ct. 141, 150-151, C.D. 4266, *aff'd on other grounds,* 60 CCPA 86, C.A.D. 1087, 472 F. 2d 1050 (1973):

> [W]ith the advent of the decision of the Supreme Court in *Downs*, it is clear that if Congress had wanted to nullify the effect of the decision in that case it could easily have done so through reenactment of a successor provision to section 5 of the 1897 Tariff Act (or amended the statute) that expressly excluded tax remissions from its ambit, akin to its treatment of that subject in paragraph 182½ of the 1894 Tariff Act. The fact that Congress has never done so is, in our opinion, indicative that it approves of the holding in *Downs,* by reason of which, that case represents the law on the subject of tax remissions to date insofar as the question of "bounties" is concerned.

The Congress also chose to include such meaningful terms and phrases in the Tariff Act of 1897 as:

> "pay or bestow," "directly or indirectly," "any bounty or grant," "net amount of such bounty or grant," "however the same be paid or bestowed" and "[t]he net amount of all such bounties or grants shall be from time to time ascertained, determined, and declared by the Secretary of the Treasury * * *."

The inclusion of these terms as well as the significance of their inclusion has been noted by the Supreme Court. In its consideration of the aforequoted language and in answer to the argument of petitioner's counsel therein, which closely parallels the contentions now urged by the defendant in this proceeding, the Court in the case of *Nicholas & Co.* v. *United States,* 249 U.S. 34 (1919), at 38-39 stated:

> In further support of their distinctions *counsel cite the executive practice of this country, and adduce the decisions of this and other courts to show that such practice is a useful resolvent of the meaning of words and of legislative intention.*
>
> We appreciate the strength of the argument, but the circumstances are but aids to persuasion; they do not compel it. Every new statute is individual and presents its own problem. *That before us does, and, as we have said, looking at its words alone, has no uncertainty of purpose.* Whenever any country "shall pay or bestow, directly or indirectly, any bounty or grant upon the exportation of any article or merchandise," there shall be levied and paid upon it, upon importation, in addition to the regular duty, an additional one "equal to the net amount of such bounty or grant, however the same be paid or bestowed." The statute was addressed to a condition, and its words must be considered as intending to define it, and all of them—"grant" as well as "bounty"—must be given effect. If the word "bounty" has a limited sense, the word "grant" has not. A word of broader significance than "grant"

could not have been used. Like it synonyms "give" and "bestow," it expresses a concession, the conferring of something by one person upon another. And if the "something" be conferred by a country "upon the exportation of any article or merchandise," a countervailing duty is required by Paragraph E. [Emphasis supplied.]

The absence of a specific reference to the words "net amount" in prior decisions does not justify the application of an esoteric meaning to the term. The word "net" as used therein should be given no other connotation than its ordinary meaning. *American Customs Brokg. Co., Inc., a/c Hamakua Mill Co.* v. *United States,* 58 CCPA 45, 433 F. 2d 1340 (1970). The use of the word "net" permits the application of the statute with equal facility in the determination of the amount of a bounty paid under differing laws of any foreign nation. Thus, in ascertaining the "net amount" of a bounty or grant, the opportunity exists to consider whether a bounty may have been paid either in full or in part or whether the bounty in question may have been offset in full or in part by other charges consistent with the law of the foreign nation from which the exports have been received. In short, the term "net" has been used to afford the Secretary of the Treasury a criterion to determine the appropriate amount of a countervailing duty which may be applied to the respective exports which have been the beneficiary of differing bounties of any foreign nation. Clearly, however, the criterion used to determine the proper amount of a countervailing duty includes both nonexcessive and excessive tax remissions. Accordingly, when it has been determined that a bounty or grant has been paid by a foreign nation upon its exports, the duty and responsibility of the Secretary of the Treasury lies only and solely in the power delegated to him by the Congress to determine the "net amount" thereof.

In light of the foregoing, the construction and interpretation urged by the defendant cannot be accepted by this court.

II

If, as the defendant contends, a long-standing administrative interpretation of the countervailing duty statute should alone dictate the presently accepted legal construction thereof, then, indeed, judicial review becomes a mockery. It is acknowledged that, "[t]he interpretation of a statute by an agency charged with its enforcement is a substantial factor to be considered in construing the statute, *New York Dept. of Social Services* v. *Dublino,* 413 U.S. 405, 421 (1973); *Columbia Broadcasting System, Inc.* v. *Democratic Comm.,* 412 U.S. 94, 121 (1973) • • • ." *Youakim et al.* v. *Miller,* 425 U.S. 231, 235-236 (1976). However, it must also be acknowledged that in the construction of a statute an "expressly articulated position" should be adopted at the administrative level. *Investment Co. Institute* v. *Camp,* 401 U.S. 617 (1971). Where it appears that the statutory interpretation by a department or agency is in error, judicial approbation should not be given. In the recent case of *Espinoza* v. *Farah Mfg. Co., Inc.,* 414 U.S. 86, 94-95 (1973), the United States Supreme Court clearly recognized this limitation upon the independent exercise of administrative statutory construction:

> The Commission's more recent interpretation of the statute in the guideline relied on by the District Court is no doubt entitled to great deference, *Griggs* v. *Duke Power Co., supra,* at 434; *Phillips* v. *Martin Marietta Corp.,* 400 U.S. 542, 545 (1971) (Marshall, J., concurring), but that deference must have limits where, as here, application of the guideline would be inconsistent with an obvious congressional intent not to reach the employment practice in question. Courts need not

> defer to an administrative construction of a statute where there are "compelling indications that it is wrong." *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969); see also *Zuber* v. *Allen*, 396 U.S. 168, 193 (1969); *Volkswagenwerk Aktiengesellschaft* v. *FMC*, 390 U.S. 261, 272 (1968).

The defendant has urged that ambiguity in the countervailing duty statute justifies the acceptance of the longstanding interpretation applied by the Secretary of the Treasury.[2] A careful examination of the countervailing duty provisions contained in the original Act of 1897 and reenacted in all subsequent countervailing duty statutes neither reflects the ambiguity alleged by the defendant, nor sustains the "reasonability" of the interpretation adhered to by the Secretary of the Treasury. Particularly, is this true in light of the clear construction of the statute and the specific terms "bounty" and "grant" contained therein by the Supreme Court in the cases of *Downs* v.

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[2] The present interpretation urged by the defendant is contrary to the interpretation offered by the defendant in its briefs to the Supreme Court in the *Downs* and *Nicholas* cases. The position of the government therein is reflected by the following statement:

> Furthermore, if a foreign government should object to our drawbacks or remission of internal taxes as unduly encouraging our export trade to that government's detriment, in its own markets, and as amounting in practical effect to an indirect bounty, we might successfully urge our diplomatic resistance to that view, but I can not see that we should have conclusive legal ground for resisting simply because it was an ordinary tax remission or drawback in our municipal system. • • •
>
> • • • For it seems that any special favor, benefit, advantage, or inducement conferred by the Government, even if it is given as a release from burden and is not a direct charge upon the Treasury, is fairly included in the idea and meaning of an indirect bounty. [Brief for The United States, in The Supreme Court of the United States, October Term 1902, on Writ of Certiorari, *Downs* v. *United States*, No. 318 at 23-24, 25.]

United States, 187 U.S. 496 (1903) and *Nicholas & Co.* v. *United States, supra.*

What then is the real question before us in this proceeding? To no extent can it be said that the issue is limited to a question involving a recognized right of a governmental department to interpret a statute, the provisions of which it is charged to enforce. Rather, the basic question before us is whether the Secretary of the Treasury shall have the right and be permitted to continue to interpret the provisions of our countervailing duty statute contrary to its explicit and unambiguous language and contrary to the interpretation and construction previously placed thereon by the highest Court of our land. The answer can only be, no.

In the Trade Act of 1974 (19 U.S.C., sec. 2101), under which statute we are guided in this action, Congress has laid to rest with finality any question as to its intent with respect to the construction of the countervailing duty statute. In section 331 thereof, amending sections 303 and 516 of the Tariff Act of 1930 (19 U.S.C., secs. 1303, 1516), substantially the same language contained in prior countervailing duty statutes has again been incorporated. However, it will be noted that in section 303(d), the Congress affirmatively has recognized the very international economic and political problems, which the defendant in this action has directed to the attention of this court. To these problems the Congress has responded. In so doing, the Congress:

> 1. Underscores its desire and objective that the President " • • • seek through negotiations the establishment of internationally agreed rules and procedures governing the use of subsidies (and other export incentives) and the application of countervailing duties." (19 U.S.C., sec. 1303(d)(1).)
>
> 2. In keeping with this objective, the Congress does not require the imposition of the countervailing duty

provisions for a period of four (4) years from the date of the enactment of the Trade Act if:

a. The Secretary of the Treasury determines adequate steps have been taken to reduce substantially or eliminate the adverse effect of a bounty or grant, and that

b. a reasonable prospect exists that successful trade agreements will be entered into reducing or eliminating the trade barriers in question, and

c. imposition of the additional countervailing duty would be likely to seriously jeopardize the completion of such negotiations.[3]

Any decision not to impose the appropriate countervailing duty of the Secretary of the Treasury pursuant to the foregoing delegated authority is required to be reported to the Congress, either body of which may disapprove the decision of the Secretary, thereby restoring the immediate and full application of the countervailing duty provisions.[4]

From the foregoing, it is clear that the Congress has reaffirmed not only to the executive branch of this government, but to all nations, its approval of the judicial construction placed upon the countervailing statutes of the United States. At the same time, however, a procedure is provided to assist in the resolution of international problems relating to bounties, grants and subsidies through negotiation and the establishment of internationally agreed rules.[5]

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[3] 19 U.S.C., sec. 1303(d)(2)(A)(B)(C).

[4] 19 U.S.C., sec. 1303(e)(1)(2).

[5] The report of the Committee on Ways and Means, House of Representatives, in the consideration of this legislation is illustrative of the realization by the Congress of the need to provide discretionary authority on the part of the Secretary of the Treasury to withhold the application of the countervailing duty provisions if the same may prove counterproductive during the course of negotiations.

The 4-year temporary discretionary authority was accorded because of the very real danger that the mandatory provisions of section 303, combined with the committee's amendment providing for a 12-month time limit for action under this section, could compel the Secretary to take actions which might well frustrate the successful outcome of the forthcoming negotiations. The committee is aware that there are differences of opinion internationally as to what constitute permissible and nonpermissible export assists under international law and practice, and that the negotiation of an agreement on this issue may prove difficult. *The committee has no desire to sanction certain existing export-assist practices conducted by various foreign governments.* It also recognizes that the United States itself may well be conducting programs of export-assists which foreign governments may find inconsistent with international law and policy.

With this background, the Secretary of the Treasury must be temporarily accorded some degree of latitude in administering section 303 until an international agreement is reached regarding the international practices which would be considered permissible and nonpermissible. Otherwise the Secretary of the Treasury may conceivably be constrained to take countervailing action under section 303 against a practice which ultimately may be internationally agreed to be a permissible international export assist. The discretionary authority accorded herein has been restricted to 4 years to facilitate the international negotiations. It has been accorded on the understanding that the U.S. negotiators will report regularly to the Congress on the progress and ultimately on the outcome of the negotiations with respect to international export assists. *The committee assumes that it may be necessary to further amend section 303 depending upon the outcome of these negotiations, assuming that they terminate in an agreement acceptable to the United States.* [Emphasis supplied.] [H.R. 10710, House Committee on Ways and Means, House Report No. 93-571, 93d Cong., 1st Sess., October 10, 1973, at 75-76.]

Many of the issues and the facts relating thereto which have been presented to this court were likewise presented

to the Congress at the time of its consideration of the Trade Act of 1974. Had the Congress intended to exclude the remission and/or exemption of a nonexcessive excise tax from the classification of a bounty or grant, it could and would have done so. It has chosen not to so do, but rather to open the door to discussion and negotiation among the nations. To construe our recently enacted countervailing duty statute in conformity with the interpretation urged by the defendant not only would disregard the statutory intent of the Congress, but would thwart the very objective it seeks to attain through negotiation and agreement.

It having been determined in the proceeding that the remission of the Japanese commodity tax upon the electronic products which are the subject of this action constitutes a bounty or grant under our present countervailing duty statute (19 U.S.C., sec. 1303), the instant action, accordingly, should be remanded to the Secretary of the Treasury to determine and assess an additional duty equal to the net amount of the bounty or grant bestowed upon such products exported from Japan and entered into the United States from and after the entry of judgment herein.

APPENDIX B

APPENDIX B

Judgment of the United States Customs Court

ORDER

Upon reading and filing plaintiff's motion for summary judgment and defendant's cross-motion for summary judgment, and upon all other papers and proceedings had herein, it is hereby

ORDERED that plaintiff's motion for summary judgment be, and the same is granted, and it is further

ORDERED that defendant's cross-motion for summary judgment be, and the same is, denied.

ADJUDGED AND DECREED that the exemption, under the Commodity Tax Law of Japan, of television receivers, radio receivers, radio-phonograph combinations, radio-television-phonograph combinations, radio-tape recorder combinations, record players and phonographs complete with amplifiers and speakers, tape recorders, tape players, and color television picture tubes (hereinafter "subject electronic products") from a commodity tax, when exported from Japan, or the refund of such tax on the exportation from Japan of the subject electronic products, constitutes the payment or bestowal of a net bounty or grant within the embrace of section 303 of the Tariff Act of 1930, as amended (19 U.S.C. § 1303); and

The Secretary of the Treasury is hereby directed to ascertain and determine or estimate the net amounts of the bounty or grant paid or bestowed on the exportation of the subject electronic products from Japan and to order the appropriate customs officers throughout the United States to assess countervailing duties, in said net amounts equal to the said bounty or grant, on the subject electronic products exported from Japan, entered or with-

drawn from warehouse for consumption on or after the day following the date of entry of this Order.

SCOVIL RICHARDSON
J.
BERNARD NEWMAN
J.
NILS A. BOE
J.

Dated: New York, New York
April 12, 1977.

APPENDIX C

APPENDIX C

Opinion of the United States Court of Customs and Patent Appeals and Dissenting Opinion

(C.A.D. 1195)

THE UNITED STATES v. ZENITH RADIO CORPORATION, No. 77-19

Before MARKEY, *Chief Judge*, RICH, BALDWIN, LANE and MILLER, *Associate Judges*.

MARKEY, Chief Judge.

Appeal by the United States from a judgment of the United States Customs Court, 78 Cust. Ct.—, C.D. 4691, 430 F. Supp. 242 (1977), holding that remission of a Japanese commodity tax, on electronic products exported from Japan, constitutes a bounty or grant under § 303, Tariff Act of 1930, as amended, 19 USC 1303 (Supp. V 1975), and granting summary judgment to Zenith Radio Corporation (Zenith). We reverse.

Background

In 1970, Zenith petitioned the Commissioner of Customs,[1] alleging that bounties or grants were being bestowed upon the manufacture and export of certain products[2] from

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[1] Although § 303 imposes the burden of making countervailing duty determinations upon the Secretary of the Treasury, regulations (19 CFR § 16.24(b) (1970), now 19 CFR § 159.47(b) (1976)), require communication with the Commissioner of Customs.

[2] The products include: television receivers, radio receivers, radio-phonograph combinations, radio-television-phonograph combinations, radio/tape recorder combinations, tape players, record players and phonographs complete with amplifiers and speakers, tape recorders, and parts of television receivers: color television picture tubes, resistors, transformers (deflection components), and tuners for receivers with integrated circuits. 37 Fed. Reg. 10,087 (1972), as amended 37 Fed. Reg. 11,487 (1972).

Japan. The Commissioner investigated and, on January 7, 1976, published a "Final Negative Countervailing Duty Determination," announcing that "no bounty or grant is being paid or bestowed, directly or indirectly, within the meaning of section 303." 41 Fed. Reg. 1298 (1976). Zenith, pursuant to § 516(d), 19 USC 1516(d) (Supp. V 1975), contested the determination in the United States Customs Court.

The Japanese Tax

The Japanese Commodity Tax Law, Law No. 48 of 1962, as revised and insofar as it appears in the record, imposes a single-stage "commodity tax" upon a manufacturer's shipment of specified electronic products for consumption in Japan. The same products are exempt from the tax when shipped for export.[3] A tax paid on a shipment for home consumption is refunded if that shipment is later exported.[4] It is undisputed that the tax is internal, and that the application of the tax to internal shipments, while refusing to apply it to exports,[5] is the sole governmental action which was adjudged below to have created a countervailable bounty or grant.

The Customs Court

Upon application by the United States, a three-judge panel was convened pursuant to § 108, Customs Court Act

[3] Tax exemption is also accorded certain goods sold at home to educational and welfare institutions, the National Museum, and other specified purchasers.

[4] We employ "remission" to denote both tax exemption and tax refund, which are legally indistinct on this appeal.

[5] A tax on American exports would be unconstitutional. U.S. Const. art. 1, § 9, cl. 5. *Fairbank* v. *United States,* 181 U.S. 283 (1901). Amicus cites the remission of state taxes upon shipments into other states of the United States. Neither consideration is applicable to a determination under § 303.

of 1970. 28 USC 255 (1970). Both parties moved for summary judgment. Relying heavily upon *Downs* v. *United States,* 187 U.S. 496 (1903), the court held that remission of the Japanese Commodity Tax constituted a bounty or grant under § 303, as a matter of law.[6]

Accordingly, the court granted Zenith's motion for summary judgment and ordered the Secretary of the Treasury to determine the net amounts of the bounties or grants and to assess countervailing duties equalling those amounts "on the subject electronic products exported from Japan, entered or withdrawn from warehouse for consumption on or after the day following the date of entry of this Order."

The Issue

The dispositive issue is whether the mere remission of an excise[7] tax must, as a matter of law, be deemed a bounty or grant under 19 USC 1303 (Supp. V 1975):[8]

§ 1303. Countervailing duties.

(a) Levy of countervailing duties.

(1) Whenever any country, dependency, colony, province, or other political subdivision of government, person, partnership, association, cartel, or corporation, shall pay or bestow, directly or indirectly, any bounty

[6] Judge Richardson wrote for the court. Judges Newman and Boe filed concurring opinions. The thorough treatment given the issues by the distinguished judges of the panel rests essentially upon an interpretation of *Downs* with which we differ.

[7] The parties have described the tax as a "commodity," "consumption," and "excise" tax. For clarity, we employ "excise" throughout.

[8] The United States contends on appeal that under § 516(g), 19 USC 1516(g) (Supp. V 1975), the Customs Court exceeded its subject matter jurisdiction in ordering duties imposed prior to publication of the decision in the Customs Bulletin. We do not reach that issue.

or grant upon the manufacture or production or export of any article or merchandise manufactured or produced in such country, dependency, colony, province, or other political subdivision of government, then upon the importation of such article or merchandise into the United States, whether the same shall be imported directly from the country of production or otherwise, and whether such article or merchandise is imported in the same condition as when exported from the country of production or has been changed in condition by re-manufacture or otherwise, there shall be levied and paid, in all such cases, in addition to any duties otherwise imposed, a duty equal to the net amount of such bounty or grant, however the same be paid or bestowed.

OPINION

Prior Cases

The rationale supporting the judgment below begins with the view that the applicable law is to be found in a paragraph from the 1903 Supreme Court opinion in *Downs*, supra.[9] Though the Customs Court remarked the presence of an elaborate certificates-plus-tax remission scheme, it found primary support for its judgment in this paragraph (from which the court quoted the first and last sentences) in the lengthy *Downs* opinion:

> The details of this elaborate procedure for the production, sale, taxation and exportation of Russian sugar are of much less importance than the two facts which appear clearly through this maze of regulations, viz.: that no sugar is permitted to be sold in Russia that does not pay an excise tax of R. 1.75 per pood, and that sugar exported pays no tax at all. The mere imposition of an import duty of three rubles per pood, paid upon foreign sugar, is, like all protective duties, a bounty, but is a bounty upon production and not upon exportation. When a tax is imposed upon all sugar produced, but is remitted upon all sugar exported, then, by whatever process, or in whatever manner, or under whatever name it is disguised, it is a bounty upon exportation. [187 U.S. at 515.]

[9] Post *Downs*, the world has seen two World Wars, an industrial revolution, a scientific revolution, and flight from Kitty Hawk to the moon. Customs duties, though large, are not our sole source of government funds, as they virtually were prior to 1916. If, nonetheless, the Supreme Court had established the law in 1903, mere passage of years could not effect our decision, the duty of revising laws to fit a new world having been constitutionally assigned to the Congress.

Opinions must be read in their entireties and in the light of the facts of the case. *Armour & Co.* v. *Wantock*, 323 U.S. 126, 133 (1944). Though the first and last sentences of the quoted paragraph, considered in vacuo, would support the judgment below, their effect as binding precedent depends upon their relationship to the underlying facts and the remainder of the opinion in *Downs*. "It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used." *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 398 (1821).

The clearest complete explanation of the complex Russian sugar scheme in *Downs* appears in the Board of General Appraisers' opinion, *Downs* v. *United States*, 4 Treas. Dec. 405, 409-413, T.D. 22984 (1901). The excise tax and certificate elements of the scheme were there described as:

> VI. That, upon the exportation of said sugar * * *, the Russian Government, * * * released said sugar from said tax of 1.75 rubles * * * by a refund * * * a cancellation of indebtedness, or otherwise.
>
> VII. That, in addition to remitting said excise tax, the Government issued to the exporter a certificate certifying that he had exported * * * free sugar. That

• • • such certificates • • • have a substantial market value • • •.

VIII: That said certificates are sold to and used by sugar manufacturers or refiners, who are thereby enabled to transfer from their "free reserve or free surplus" to their "free sugar" an amount of sugar equal to the amount shown by said certificates to have been exported, which amount may then be sold for domestic consumption on paying the ordinary tax of 1.75 rubles per pood (to which free sugar is regularly subject). [4 Treas. Dec. at 411.]

The board recognized that the combination of (1) regular and additional tax rebates, and (2) export certificates, operated to confer a bounty on sugar exports:

> It is manifest • • • that the exporter • • • receives a valuable bonus • • • and that this bonus accrues • • • upon the exportation • • •. The export certificates or vouchers • • • are only the legal evidence of this valuable privilege or grant conferred by the Government, without whose authority such transfers of sugar would be valueless and of no effect.
>
> Our conclusion, therefore, is that a bounty or grant • • • has been paid or bestowed • • • so as to work a benefit or advantage • • • as follows:
>
> First. • • • the Government remitted or refunded the excise tax • • • or otherwise canceled the indebtness of the sugar manufacturer, so that he was enabled to place his product upon the market free from the burden of either the regular or additional excise tax.
>
> Second. The certificate • • • had a substantial market value, and was transferable, and operated as a premium, grant, bonus, or reward. [*Id.* at 413.]

The whole Russian scheme, involving import duties, remission of regular and additional excise taxes, export certificates, and sugar transfers, was before the board, which did not decide the matter piecemeal. Hence, the appellate courts were faced with a board decision resting not on either of two independent grounds, but on a single ground having at least two important elements, and there was no call in *Downs* for the board, the Fourth Circuit, or the Supreme Court to decide whether a non-excessive remission of an excise tax constitutes a *per se* bounty or grant.

On appeal, the Fourth Circuit affirmed, *Downs* v. *United States,* 113 F. 144 (4th Cir. 1902), adopting the board opinion and focusing its own attention on the export certificates:

> We reach the conclusion that the collector of the port of Baltimore, under the provisions of the fifth section of the tariff act of July 25, 1897, properly imposed the duty now complained of by the appellant. We find that the Russian exporter of sugar obtains from his government a certificate, solely because of such exportation, which is worth in the open markets of that country from 1 ruble and 25 Kopecks to 1 ruble and 64 kopecks per pood, or from 1.8 to 2.35 cents per pound. Therefore we hold that the government of Russia does secure to the exporter of that country, as the inevitable result of its action, a money reward or gratuity whenever he exports sugar from Russia, and we think it was from such indirect grants as this that the congress of the United States intended to protect the manufacturers of this country, by authorizing the secretary of the treasury to make all proper regulations for the assessment and collection of such additional duties as were imposed by the collector on the sugars imported by the appellant. [*Id.* at 145.]

After devoting over ten pages to the elaborate Russian scheme in *Downs,* the Supreme Court referred to the petitioner's position, 187 U.S. at 512:

> It is practically admitted in this case that a bounty equal to the value of these certificates is paid by the Russian government, and the main argument of the petitioner is addressed to the proposition that this bounty is paid, not upon exportation, but upon production.

The remainder of the paragraph initiated by that sentence explains at length how bounties upon exportation may operate as bounties upon production and vice-versa.[10] The Court then responded to Downs' argument that a Russian exporter received the same amount whether or not he exported:

> But the fact that he receives the same amount, whether the goods are exported or sold at home, is not the proper test whether a bounty is paid upon exportation. If no bounty at all were paid all sugar, or at least all "free sugar," would pay the same tax, whether sold at home or exported abroad; and in this case the free sugar upon which the tax is remitted when exported would go abroad burdened with an excise tax of R. 1.75 per pood, which would prevent the manufacturer from selling it at such a price abroad as would enable him to realize a profit. The amount he receives for his export certificate, say, R. 1.25, is the exact amount of the bounty he receives upon exportation, and this enables him to sell at a profit in a foreign market. All manufacturers would prefer to sell at a profit in a foreign market. All manufacturers would prefer to sell at home if they could realize a greater price than by selling abroad, but if by being paid a drawback, or by a remission of taxes, they can find a profitable market in a foreign country, so much sugar

[10] The Tariff Act of 1922, ch. 356, § 303, 42 Stat. 935, broadened the countervailing duty law to include bounties or grants paid on manufacture and production.

> as is not needed at home will be sent abroad. [187 U.S. at 514-515.]

Earlier in its extended opinion, the Court discussed the conjunctive effect of the import tariff and excise tax exemption parts of the scheme:

> If the additional bounty paid by Russia upon exported sugar were the result of a high protective tariff upon foreign sugar, and a further enhancement of prices by a limitation of the amount of free sugar put upon the market, we should regard the effect of such regulations as being simply a bounty upon production, although it might incidentally and remotely foster an increased exportation of sugar; *but where in addition to that* these regulations exempt sugar exported from excise taxation altogether, we think it clearly falls within the definition of an indirect bounty upon exportation. [Emphasis added. 187 U.S. at 513.]

In the middle sentence of the paragraph containing the sentences quoted by the Customs Court, the Supreme Court reiterated its view that an import duty is a bounty upon production. Not without some confusion, the court thus bracketed its reference to import duty with comments that sugar sold in Russia was taxed and that exported was not and that a tax on "all sugar produced," but remitted on sugar exported, constituted a bounty upon exportation. The entire paragraph must be read as a whole, including its reference to import duty, and in the context of the entire opinion, including the Court's earlier discussion of import duty, wherein it had found a bounty in the combination of import duty and excise tax remission. We cannot read the sentences quoted above as though they were divorced from all preceding and succeeding discussion, or as establishing a proposition of law to govern a fact (tax remission alone) not before the Court.

The Supreme Court not only considered the Russian scheme as a whole, but listed the actual price differences it created. The Court ended its opinion with the statement (re certificates) of the Fourth Circuit quoted above and stated, "We all concur with this expression of opinion." 187 U.S. at 516. Thus the Court's *decision* was that the scheme bestowed a bounty. The Court did elect to insert in its *opinion* the broad language of the two sentences which served as foundation stones for the judgment now under review. That broad language was not necessary to the Supreme Court's decision and was not, therefore, its ratio decidendi.[11] When it is read, as it must be read, in light of the facts before the Court, that broad language did not constitute a Supreme Court holding that every nonexcessive remission of every excise tax constitutes a bounty or grant as a matter of law.

We are mindful, as was the Customs Court, of subsequent references to broad statements in *Downs*. See e.g., *Nicholas & Co.* v. *United States*, 249 U.S. 34 (1919); *American Express Co.* v. *United States*, 67 Cust. Ct. 141, C.D. 4266, 332 F. Supp. 191 (1971), *aff'd on other ground*, 60 CCPA 86, C.A.D. 1087, 472 F.2d 1050 (1973); *F. W. Meyers & Co.* v. *United States*, 6 Treas. Dec. 260, T.D. 24306 (Bd. Gen. App. 1903). Those references cannot, however, require

[11] The language has been described as dicta by some commentators, e.g., Butler, *Countervailing Duties and Export Subsidization: A Re-emerging Issue in International Trade*, 9 Va. J. Int'l L. 82 (1968-69); Feller, *Mutiny Against the Bounty: An Examination of Subsidies, Border Tax Adjustments, and the Resurgence of the Countervailing Duty Law*, 1 Law & Pol. Int'l Bus. 17 (1969); Note, *The Michelin Decision: A Possible New Direction for U.S. Countervailing Duty Law*, 6 Law & Pol. Int'l Bus. 237 (1974), and by this court, in referring to the Customs Court's reliance on *Downs* and *Nicholas*, infra, in *United States* v. *Hammond Lead Products, Inc.*, 58 CCPA 129, 137, C.A.D. 1017, 440 F. 2d 1024, 1030 (1971), *cert. denied*, 404 U.S. 1005 (1971).

us to disregard the facts in *Downs*, *Nicholas*, *American Express*, and *Meyers*.[12]

The Supreme Court has instructed us, *Kastigar* v. *United States*, 406 U.S. 441, 454-55 (1972), that broad language unnecessary to the Court's decision in an 80-year-old case is not to be blindly accepted as binding authority, despite its having been quoted in many subsequent cases and even though the language had been described as stating the "principle" of the old case.

There being no prior instance in which any court has been presented with the question of whether, as a matter of law, the remission of an excise tax, without more,

[12] A review of the cited and researched cases establishes, as in *Downs*, that the bounty or grant in each case was found to reside in, and was measured by, an *excess* over the remission of excise taxes. Nor is that surprising in view of Treasury's practice, discussed infra. Thus, in *Franklin Sugar Refining* v. *United States*, 1 Ct. Cust. Appls. 242, T.D. 31276 (1911), a 2.50 mark "export bounty" was countervailed and a remitted 20 mark consumption tax was not. In *Nicholas* a British scheme involved tax remission *and* an "allowance" of 3d and 5d per gallon for exported spirits. On appeal in *American Express*, supra, this court found it unnecessary to review the Customs Court's broad interpretation of *Downs* and *Nicholas* and looked to the many *hidden* taxes which were remitted in excess of any remitted excise tax. *United States* v. *Hills Bros. Co.*, 107 F. 107 (2d Cir. 1901) involved excess rebates on sugar exports. *F. W. Woolworth Co.* v. *United States*, 28 CCPA 239 (1940), involved a bounty created by currency manipulation. In *Marion R. Gray* v. *United States*, 70 Treas. Dec. 811, T.D. 48679 (1936), the Customs Court stated, "* * * at least a part of the *excess* of Great Britain's drawback paid to the manufacturer, constitutes a bounty or grant * * * under section 303 of the tariff act involved." [Emphasis added. *Id.* at 813.]

United States v. *Passavant*, 169 U.S. 16 (1898), involved dutiable value, not countervailing duties. *F. W. Myers, supra*, involved an export duty governed by para. 393, Tariff Act of 1897, not the remission of an excise tax.

bestows a countervailable bounty or grant, we confront a case of first impression.[13]

The Statute

The intent of Congress, as expressed in § 303 itself, is not difficult to fathom. As the predecessor of this court, in *Nicholas & Co.* v. *United States,* 7 Ct. Cust. Appls. 97, T.D. 36426 (1916), and the Supreme Court in *Nicholas,* 249 U.S. at 39, indicated, the words "bounty" and "grant" are broad but not ambiguous. "Net amount" necessarily means that countervailing duties should equate to the true bounty or grant actually conferred. Congress' intent to provide a wide latitude, within which the Secretary of the Treasury (Secretary) may determine the existence or non-existence of a bounty or a grant, is clear from the statute itself, and from the congressional refusal to define the words "bounty," "grant," or "net amount," in the statute or anywhere else, for almost 80 years. As affects the present case, and consistent with that broad intent, Congress has not statutorily required that every governmental action distinguishing between products consumed at home and those exported shall be deemed the bestowing of a bounty or grant.

As this court's predecessor said in *Nicholas,* supra, 7 Ct. Cust. Appls. at 106: "It was a *result* Congress was seek-

[13] Judicial review of negative countervailing duty determinations was not sought before 1971 Congress made it available to manufacturers, producers and wholesalers in 1975, § 516(d), Tariff Act of 1930, as amended, 19 USC § 1516(d) (Supp. V 1975), in response to this court's recognition of its nonavailability to those groups in *Hammond Lead,* supra note 11.

Congress did not, however, require hearings and preparation of a hearing record from which it might be determined, on review, whether the Secretary's action was supported by substantial evidence or was arbitrary or capricious, in the manner practiced, for example, under the Administrative Procedure Act, 5 USC 551 et seq. Nor have the regulations, 19 CFR 159.47, Part 175 (1976), prescribed under § 516(h), done so. Congress did require hearings, on request, in antidumping cases, 19 USC 160(d) (Supp. V 1975).

ing to equalize regardless of whatever name or in whatever manner or form or for whatever purpose it was done." On appeal in *Nicholas,* 249 U.S. at. 39, the Supreme Court said: "The statute was addressed to a condition and its words must be considered as intending to define it, and all of them—'grant' as well as 'bounty' must be given effect."

Neither form nor nomenclature being decisive in determining whether a bounty or grant has been conferred, it is the economic result of the foreign government's action which controls. Thus, the language of § 303, "[w]henever any country * * * shall pay or bestow * * * any bounty or grant," requires a factual inquiry. The statute assigns that factual inquiry, in the first instance, to the Secretary. Courts may review a factual record upon which a determination has been based, but are woefully ill-equipped to undertake unaided the complex economic analyses required to determine whether a bounty or grant has in fact been conferred as a result of a particular governmental action. In the present case, the record is silent regarding the economic result of the mere remission of the Japanese Commodity Tax. The Secretary has presumably determined that the economic result here is not the conferring of such a benefit, subsidy, or incentive as would rise to the level of a bounty or grant under § 303.

The factual underpinnings of the Secretary's negative countervailing duty determination in this case are not under attack. On the contrary, the sole question on this appeal is whether the mere remission of the Japanese Commodity Tax must be deemed a bounty or grant as a matter of law. Nothing in the statute itself so requires.

Legislative History

The imposition of countervailing duties, on imports other than sugar, was first provided for in § 5 of the Tariff Act of 1897, 30 Stat. 205. The parties agree that Congress repeatedly reenacted that basic provision without substantial

change (§ 6 of the Tariff Act of 1909, 36 Stat. 85; para. E of the Tariff Act of 1913, 38 Stat. 193; § 303 of the Tariff Act of 1922, 42 Stat. 935; § 303 of the Tariff Act of 1930, 46 Stat. 687; and as § 331(a) of the Trade Act of 1974, 19 USC 1303 (Supp. V 1975)).

The United States says the absence of definitions for "bounty," "grant" and "net amount" creates ambiguity, requiring resort to legislative histories of the Tariff Acts of 1890, 1894, and 1897. Zenith, as did the Customs Court, cites the Supreme Court's indication in *Nicholas,* supra, that "bounty" and "grant" are not ambiguous. Both parties have supplied extensive reviews of legislative history in support of their respective positions.

Respecting the legislative history behind "bounty," "grant," and "net amount," we are convinced, after careful review of the cited floor statements, committee reports, submissions and testimony, and after full consideration of the conflicting inferences drawn therefrom by the parties, that Congresses since 1890 have elected to refrain from stating that any specific condition would constitute a bounty or grant effective to require imposition of countervailing duties under § 303,[14] and to refrain from specifying a method of calculating net amount. Certain it is that nothing in the voluminous citations of record indicates a congressional intent that countervailing duties must be imposed in response to a nonexcessive remission of an excise tax, the condition now before us.

[14] The United States cites the exclusion of internal taxes remitted on exports from the cost of materials in determining constructed value, § 402(d), Tariff Act of 1930, as amended, 19 USC 1401a(d), and the including of such remitted taxes in determining purchase price under § 203, Antidumping Act of 1921, 19 USC 162 (Supp. V 1975), as indicating congressional evaluation of such remissions as neither unfair nor prohibitive. The point may be useful in urging consistency on the part of the Congress. It cannot, however, supply a congressional definition of "bounty," "grant" or "net amount" appearing in § 303.

Not without reason has Congress refrained from spelling out either the precise criteria for determining what shall constitute a bounty or grant and what shall not, or the calculations to be followed in determining net amount. As this court said in *Hammond Lead,* supra note 11: "In the assessment of a countervailing duty, the determination that a bounty or grant is paid necessarily involves judgments in the political, legislative or policy spheres," 58 CCPA at 137, 440 F.2d at 1030, to which the court might well have added the eminently important economic sphere. Our nation's relationships in the world family are particularly sensitive to the assessment of the additional duties known as "countervailing" duties. Such assessment is not just a means of protecting our producers, as Congress has recognized in refusing to require proof of injury before making such assessment; it is also one of the chips in a game played by governments on a world stage. Presumably enacting and reenacting § 303 in this broad light, illuminative of the statute's role in the world, Congress in its wisdom has simply refrained from calling all the countervailing duty plays in advance.[15]

[15] Congress' most recent reference to the international implications of export incentives and countervailing duties, and to the role of the Executive in connection herewith, appears in § 331(a), Trade Act of 1974, 19 USC 1303(d)(1) (Supp. V 1975):

> It is the sense of the Congress that the President, to the extent practicable and consistent with United States interests, seek through negotiations the establishment of internationally agreed rules and procedures governing the use of subsidies (and other export incentives) and the application of countervailing duties.

To facilitate negotiations, Congress, while continuing to refrain from a definition of "bounty" or "grant," granted authority to the Secretary to suspend during the four years beginning January 3, 1975, and under certain conditions, the imposition of countervailing duties, after having determined that a bounty or grant is in fact being bestowed, 19 USC 1303(d)(2), and to reinstate such duties, 19 USC 1303(d)(3). In § 1303(e), Congress provided for reports to it of actions under § 1303(d)(2), and for the undoing thereof upon a resolution of disapproval by the Senate or the House.

Nothing, therefore, in § 303 itself, or in the cited and researched legislative history relating to the terms "bounty," "grant," or "net amount," aids the decisional process in the present appeal.

Congressional Ratification

The Customs Court considered the reenactments of § 5 of the 1897 Act as congressional ratification of the court's interpretation of *Downs*. We disagree.

The basis for the "ratification" view expressed below lies in a paragraph from a 1908 submission to the House Committee on Ways and Means:

> In Downs v. United States, 187 U.S. 496 (1903), it was held that the remission of the excise tax imposed on sugar sold in Russia granted to the exporter of sugar, which remission is awarded in the form of a certificate having a substantial market value, and the subject of purchase and sale, is equivalent to a bounty, and such sugar when imported into the United States is subject to an additional duty equal to the amount of such bounty.[16]

An assumption that Congress had the quoted paragraph in mind, when it acted in 1909, would not warrant the further assumption that it thereby ratified a holding that excise tax remission alone is a bounty. The author of the submission said the tax remission was "in the form of a certificate having a substantial market value." We shall never know whether he interpreted *Downs* as merging remission and certificate elements of the Russian scheme or whether he considered the saleable certificates alone an excessive remission. We know only that a committee was

[16] *Notes on Tariff Revision* (1908). The quoted paragraph appears on page 834 of the 953 page document. The portions on court interpretation were prepared by an assistant counsel of the Treasury.

told that the Court had held excise tax remission "in the form of" saleable certificates equivalent to a bounty.

Moreover, if Congress must be assumed to have been informed of *Downs* in 1908, it must be equally assumed to have been better informed over the last half-century. In 1916, Congress established the Tariff Commission, 39 Stat. 796. In reporting to Congress in 1918, the Commission described *Downs:*

> The [Supreme] Court affirmed the decision of the Circuit Court of Appeals. The substance of the decision may be summarized as follows: "When a tax is imposed on all sugar produced but is remitted upon all sugar exported," *and* the exporter obtains from his government, "solely because of such exportation," a certificate which possesses an actual value and is saleable in the open market, the remission of the tax is in effect a bounty upon the exportation. [Emphasis added.] [17]

Thus, Congress was advised in 1918 that the bounty in *Downs* involved more than tax remission, and the Commission's report tends to defeat the notion that Congress, in reenacting § 303, intended to require the imposition of countervailing duties in response to tax remission alone.

In all events, the applicable statute is § 331(a) of the Trade Act of 1974, 88 Stat. 2049 (amending § 303 of the Tariff Act of 1930), 19 USC 1303, and rusted segments of legislative history, generated in other times, under other conditions, may be of limited value when recent segments, touching more current questions are available. As will be seen, the cognizant committees of the 93rd Congress did refer, albeit ambivalently, to the Treasury Department's in-

[17] United States Tariff Commission, *Reciprocity and Commercial Treaties*, 434 (1919) (available, Department of State Library).

terpretation of § 303 and its long-standing practice under that interpretation.

Administrative Practice

Since 1898, the Treasury Department has consistently and uniformly interpreted § 303 as requiring that there be an "excessive" remission of an excise tax, i.e., the governmental giving of something above and beyond mere excise tax remission, to have a bounty or grant.[18] Conversely, it has consistently and uniformly, for now almost 79 years, interpreted § 303 as not requiring that the mere remission of an excise tax, i.e., a "nonexcessive" remission of the type now before us, be deemed a bounty or grant.[19]

[18] See 1 Treas. Dec. 696, T.D. 19321 (1898); 2 Treas. Dec. 157, T.D. 19729 (1898); 2 Treas. Dec. 996, T.D. 20407 (1898); 26 Treas. Dec. 825, T.D. 34466 (1914); 54 Treas. Dec. 101, T.D. 42895 (1928); 56 Treas. Dec. 342, T.D. 43634 (1929); 73 Treas. Dec. 107, T.D. 49355 (1938). See also, the countervailing duty cases in note 12, supra.

[19] Treasury's administrative practice and some of its rationale was described to Congress in *Executive Branch GATT Studies*, S. Comm. on Finance, 93d Cong., 2d Sess. 11-12 (1974):

> Under administrative precedents dating back to 1897, the Treasury Department has generally not construed the rebate, remission or exemption on exports of ordinary indirect taxes (consumption taxes on goods) to be a "bounty or grant" within the meaning of our countervailing duty statute • • • since exports are not consumed in the country of production, they should not be subject to consumption taxes in that country. • • • application of countervailing duties to the rebate of consumption taxes would have the effect of double taxation • • • the United States would • • • impose • • • Federal and state excise taxes and state and local sales taxes, but would also collect, through • • • countervailing duty, the indirect tax imposed by the exporting country on domestically consumed goods.
>
> The Treasury Department has not applied these precedents to tax "rebates" in excess of taxes collected on the exported product. If, for example, the foreign exporter has paid $1 in excise taxes on a product he exports to the United States but receives a rebate of $1.20 on exportation, under long-established administrative precedents of the Treasury Department the imported merchandise would be subject to a countervailing duty of $0.20.

The Treasury Department has historically assumed that an excise tax is part of the price paid by home consumers. On the present record, that must be assumed true of the Japanese Commodity Tax. Where the tax is "paid" by home consumers, its remission on exports has not been considered a bounty or grant because the remission does not increase the manufacturer's profit margin. In recent years, a dichotomy has grown among economists regarding the possible difference in result when all or part of the tax is either "forward-shifted" or "absorbed." See the commentaries listed supra note 11, and Rosendahl, *Border Tax Adjustments: Problems and Proposals*, 2 Law Pol. Int'l Bus. 85 (1970).

[20] For example, in *Copper Queen Mining Co.* v. *Territorial Board of Equalization*, 206 U.S. 474, 479 (1907), the Court was faced with an 18-year-old administrative interpretation of the statute. Justice Holmes wrote: "[W]hen for a considerable time a statute notoriously has received a construction in practice from those whose duty it is to carry it out, and afterwards is reenacted in the same words, it may be presumed that the construction is satisfactory to the legislature, unless plainly erroneous, since otherwise naturally the words would have been changed."

A long-continued, uniform administrative practice, if not contrary to or inconsistent with law, is entitled to great weight, *Saxbe* v. *Bustos*, 419 U.S. 65 (1976), particularly where, as here, those charged with its administration adopted that practice contemporaneously with the inception of the statute, *Power Reactor Development Co.* v. *International Union of Electrical Workers*, 367 U.S. 396 (1961), and when Congress has repeatedly reenacted the statute without change,[20] *Saxbe*, supra; *Massachusetts Mutual Life Insurance Co.* v. *United States*, 288 U.S. 269, 273 (1933); *Komada* v. *United States*, 215 U.S. 392 (1910); *C. J. Tower & Sons* v. *United States*, 44 CCPA 41, 44 C.A.D. 634 (1957); *United States* v. *Lawrence*, 11 Ct. Cust. Appls. 203, 208, T.D. 38967 (1921), and when Con-

gress has failed to revise the statute in the face of such administrative practice, *United States* v. *Midwest Oil Co.*, 236 U.S. 459 (1915), and when Congress has refused requests to legislate a change, *United States* v. *Bergh*, 352 U.S. 40, 46 (1956); *Allstate Construction Co.* v. *Durkin*, 345 U.S. 13 (1953). Moreover, to sustain an administrative interpretation of a statute, a court "need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings." *Unemployment Compensation Commissioner* v. *Aragon*, 329 U.S. 143, 153 (1946). Under the Internal Revenue Code, "Treasury regulations and interpretations long continued without substantial change applying to unamended or substantially reenacted statutes, are deemed to have received congressional approval and have the effect of law." *Helvering, Commissioner* v. *Winmill*, 305 U.S. 79, 83 (1938).[21]

The Customs Court dismissed the effect of Treasury's administrative practice because it deemed that practice contrary to the law it had gleaned from *Downs*, and because it found a failure of Congress to codify the prac-

[21] The United States cites the reasonableness of its practice and numerous cases setting forth guidelines for judicial review of agency action under the Administrative Procedure Act. We are not, however, reviewing a record under that Act in this case. See, supra note 13.

The United States also argues that its long practice coincides with international agreements (e.g., the GATT) and with international practice, that international trade would become a shambles, and that trade wars would erupt, if the Secretary were now required to find that mere remissions of excise taxes bestowed bounties. Such arguments are irrelevant here. No agency practice may, for any reason, repeal a statute or overrule the courts. If the practice were in conflict with the statute, the intent of Congress, or judicial precedent, it could not stand, and such arguments would have to be directed to the Congress. If no conflict or inconsistency exists, the arguments are unnecessary.

tice. As above indicated, there is no judicial precedent contrary to or even inconsistent with the Treasury practice. So too, our study of the applicable legislative history from 1890 to 1975 finds no congressional action contrary to or inconsistent with the administrative practice.

The record does reflect unrequited suggestions to Congress that it enact the Treasury practice. We cannot, however, join the Customs Court in inferring therefrom a rejection or disapproval. At the outset, we find it difficult to believe that Congress would harbor in its breast a disapproval of an administrative practice for almost 80 years, while remaining so supine or irresponsible as not to change it. The suggestions on which the Customs Court focused were not that Congress should legislate a new, unheard-of practice. Though the record shows the first specific notice to Congress in 1949,[22] we cannot assume that Congress had earlier reenacted the statute four times without ever informing itself of Treasury's practice. But whether awareness of the practice has continued for 79 or for 28 years, the inference of acquiescence from Congress' failure to act against the practice over the many years involved, and through many reenactments of the statute, overbalances any inference of rejection from failure to codify it.

In 1950, the Treasury proposed an amendment which would have codified its practice and required injury to domestic industry. Objections were raised only to the injury requirement.[23] Nonadoption of that amendment can

[22] *Extension of Reciprocal Trade Agreements Act, Hearings Before the Senate Comm. on Finance*, 81st Cong., 1st Sess., 1195-99 (1949) (memorandum).

[23] See H.R. 8304, 81st Cong., 2d Sess. (1951) and *Hearings on H.R. 1535 Before the House Comm. on Ways and Means*, 82d Cong., 1st Sess., 2, 79 (1951). See *Hearings on H.R. 5505 Before*

hardly be taken as proof of Congress' disapproval of Treasury's practice. The failure to adopt may have been due to concern over the injury requirement, or to any number of reasons. We shall never know. We do know that the proposal fully informed Congress of Treasury's long-practiced interpretation and administration of § 303. Congress' failure to act or even speak against it reflected at least a then-current willingness to allow that administrative practice to continue unabated and unchanged.

In 1968, the Senate Committee on Finance was advised that Treasury considered § 303 inapplicable to nonexcessive remissions of excise taxes.[24] Congress took no action at that time. In 1970, it requested a detailed study on the subject.[25]

In considering the proposed Trade Reform Act of 1973, which evolved into the Trade Act of 1974, the cognizant Committees of Congress were informed, not only of Treasury's long continued practice, *but of the very remission of the Japanese Commodity Tax and of Zenith's countervailing duty petition now before us.* At that time, also, an amendment defining "bounty or grant" as encompassing

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the Senate Comm. on Finance, 82d Cong., 2d Sess., 115, 124-125 (1952).

In 1951, the State Department advised the Senate Finance Committee of the administrative practice under § 303 and that an amendment specifically stating that practice would merely clarify the law and would effect no change in the practice followed since the original enactment in 1897. See *Hearings on H.R. 1612 Before the Senate Comm. on Finance,* 82d Cong., 1st Sess., 1197 (1951).

[24] See 2 *Compendium of Papers on Legislative Oversight Review of U.S. Trade Policies,* Comm. on Finance, 90th Cong., 2d Sess. 475-476, 568-569, 887-889, 918-919 (1968).

[25] See S. Finance Comm. Rep. No. 91-1481 [to accompany H.R. 17550], 91st Cong., 2d Sess. 284-285 (1970).

the remission of an excise tax, the relief sought here,[26] was recommended by a witness but was not adopted.[27]

The Congress did adopt, however, as § 321(b) of the Trade Act of 1974, the administration's proposed amendment to § 203, Antidumping Act of 1921, 19 USC 162 (Supp. V 1975). The administration said the amendment would conform the standard in the Antidumping Act to the standard under the countervailing duty law. In recommending the amendment, the House Ways and Means Committee stated:

> • • • The amendment would conform the standard in the Antidumping Act to the standard under the countervailing duty law, thereby harmonizing tax treatment under the two statutes. However, your com-

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[26] The growing tendency of those who fail in their objective before the Congress to thereafter submit the same plea to undermanned federal courts is one factor contributing to the current appellate flood, which threatens to drown justice in the thrashings of a litigious sea. See D. Horowitz, The Courts and Social Policy 4-16 (The Brookings Institution, 1977). Sadly, moreover, the crowd can jam the courthouse door against the more deserving and less-advantaged.

[27] See *Hearings on H.R. 6767 Before the House Comm. on Ways and Means,* 93d Cong., 1st Sess., 2169-2171, 2496-2500, 3097, 3292-3293, 3814-3815 (1973). The Senate Committee on Finance Subcommittee on International Trade was so advised in 1971. See *Hearings on World Trade and Investment Issues Before the Subcomm. on International Trade of the Senate Comm. on Finance,* 92d Cong., 1st Sess. 102, 109-111 (1971). Though Congress' current interest in governmental assistance to foreign manufacturers may be assumed to have been occasioned by falling shares of the American market for American manufacturers, an abrupt change in a long-standing practice may have been viewed as both counter-productive in a trading world of increasingly interdependent economies and as injurious to American consumers on whom the countervailing duty might fall in the form of increased prices. However that may be, it is sufficient to our present task that Congress did not make the requested change in Treasury's practice.

mittee, in recommending this amendment, does not express approval or disapproval of the standard employed by the Treasury Department in administering the countervailing duty law with regard to the treatment under that law of rebates or remissions of direct and indirect taxes.[28]

And the Senate Committee on Finance stated:

> • • • The standard in the proposed amendment parallels that standard employed by the Treasury Department under the countervailing duty law in determining whether tax rebates and remissions constitute bounties or grants. However the Committee, in recommending this amendment, does not express approval or disapproval of that Treasury practice.[29]

The effect of the Committees' mutually contradictory approve-disapprove statements is necessarily to leave untouched the status quo with respect to the administrative practice on countervailing duties.[30] Finding no guidance in what the committees said, we look to what the Congress did.

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[28] H.R. Rep. No. 93-571, 93d Cong., 1st Sess. 69 (1973).

[29] S. Rep. No. 93-1298, 93d Cong., 2d Sess. 172 (1974).

[30] That the two key committees of the Congress, with Treasury's treatment of the Japanese Commodity Tax law and the fact of Zenith's objections before them, and with full investigative powers and resources available, could not either approve or disapprove the administrative practice on its merits, is a dramatic exemplification of the reasons why a court should avoid entry into that policy thicket. Under appropriate conditions, courts may, as we do here, hold that an administrative practice reflects a permissible interpretation of a statute, while neither approving or disapproving the merits of the practice. Approving or disapproving the wisdom, effectiveness, etc., of an agency practice is a function of the Congress, the shifting of which to the courts conflicts with the fundamental separation of powers doctrine.

The adopted amendment to the Antidumping Act provides that in determining "purchase price" of imports there shall be added to the price charged the importer:

> [a] the amount of any taxes imposed in the country of exportation directly upon the exported merchandise or components thereof, which have been rebated, or which have not been collected, by reason of the exportation of the merchandise to the United States, but only to the extent that such taxes are added to or included in the price of such or similar merchandise when sold in the country of exportation; and [b] *plus* the amount of any taxes rebated or not collected, by reason of the exportation of the merchandise to the United States, *which rebate or noncollection has been determined by the Secretary to be a bounty or grant* within the meaning of section 303 of the Tariff Act of 1930 [Emphasis added. P.L. 93-618, § 321(b), 88 Stat. 2045 (amending 19 USC 162 (1970)).][31]

In so doing, Congress signaled its continuing intent to let the administrative practice under § 303 stand unmolested. Having decreased the number of taxes added to the purchase price in (a), to the disadvantage of the exporting manufacturer, Congress then added to the price, in (b), the amount of taxes "rebated or not collected" *and* "determined by the Secretary" to be a bounty or grant. If Congress intended that all rebates or noncollections by reason of exportation be deemed bounties or

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[31] The United States argues that the Japanese Commodity Tax would fall within (a), rendering (b) redundant if Congress intended remission of such a tax to constitute a bounty or grant. On the premise that the Japanese tax is "added to or included in the price of such or similar merchandise" when sold in Japan, see note 19, supra, the argument has merit. Whether Japanese manufacturers absorb or shift the Japanese Commodity Tax, however, is an economic issue not before us.

grants, no room would have been left for Secretarial determination. In *American Express*, supra, we expressed the view that Congress required the Secretary to impose a countervailing duty when a bounty or grant has been bestowed, but left to the Secretary the determination of whether a bounty or grant had in fact been bestowed. Nothing has occurred since 1973 to require change in that view.[32]

Summary

Nothing in § 303, or in its legislative history, requires that the remission of an excise tax alone must be deemed a bounty or grant as a matter of law. Congress has, through many years and repeated reenactments of § 303, refrained from exercising its power to make such remission a bounty or grant as a matter of law. There is no judicial precedent requiring that under § 303 such remission

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[32] This court expressed the same view in *United States* v. *Hammond Lead*, 58 CCPA at 134-139, 440 F.2d at 1027-28, 1031. The prompt congressional provision of judicial review, supra note 13, while remaining silent with respect to this court's description of the Secretarial function under the statute, further confirms Congress' acquiescence, in the Treasury's administrative practice.

We do not imply that the Secretary has carte blanche, or the right to be totally arbitrary or inconsistent in applying a longstanding practice. Whether the Secretary could, however, under appropriate conditions, change present practice and begin to deem excise tax remission alone a bounty or grant is not before us. The value and effect of administrative practice, and the Secretary's authority to change it, have acquired statutory recognition in the field of customs. Under 19 USC 1315(d) (Supp. V 1975), a practice setting a particular duty, and found by the Secretary to have been uniform, can be changed to assess a higher duty, but only as to imports occurring at least 30 days after publication of the higher duty. In the Trade Act of 1974, Congress amended this section to exempt the assessment of countervailing duties from the 30 day delay provision and thus altered Treasury's practice. § 331(c), Tariff Act of 1974, 19 USC 1315(d) (Supp. V 1975). See [1974] U.S. Code Cong. & Ad. News 7320.

must be deemed a bounty or grant. The remaining tool in the decision-making inventory—a long-continued administrative practice not inconsistent with law—rests on an interpretation of § 303 as not requiring that such remission be deemed a bounty or grant.

As the Supreme Court said in *Saxbe* v. *Bustos*, 419 U.S. at 74:

> This longstanding administrative construction is entitled to great weight, particularly when, as here, Congress has revisited the Act and left the practice untouched. Such a history of administrative construction and congressional acquiescence may add a gloss or qualification to what is on its face unqualified statutory language.[33]

Paraphrasing what the Court later said in *Saxbe*, 419 U.S. at 79-80, to fit our case:

> Second, if • • • [a nonexcessive remission of an excise tax alone is now to be deemed a bounty,] the Congress [or the Executive] must do it. The changes suggested implicate so many policies and raise so many problems of a political, economic, and social nature that it is fit that the Judiciary recuse itself. At times judges must legislate "interstitially" to resolve ambiguities in laws. But the problem of • • • [changing a 79 year administrative practice effecting world

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[33] Mr. Justice White's dissent in *Saxbe* saw the statute there involved as leaving nothing open to construction, the administrative practice as in conflict with the statute, the Congress as not having been shown aware of the practice and its silence, which may have been due to unawareness, preoccupation or paralysis, as inadequate proof of acceptance. In the present case, "bounty" and "grant" have remained undefined by Congress; the statute delegates to the Secretary the determination of what is a bounty or grant; the administrative practice is not in conflict with the statute, judicial decisions, or congressional expression; Congress has long and often been aware of the practice; and, concerning customs matters, Congress has in no manner been paralyzed.

trade] is not "interstitial" or, as Mr. Justice Holmes once put it, "molecular." It is a massive or "molar" action for which the Judiciary is ill-equipped.

Conclusion

Until lawfully changed, the administrative practice of the Treasury Department, in uniformly considering a non-excessive remission of an excise tax as failing to constitute a bounty or grant, must stand as a lawfully permissible interpretation of § 303. On this record, that interpretation is fully applicable to the Japanese Commodity Tax Law.

It follows that the Customs Court erred in granting Zenith's motion for summary judgment and in denying that of the United States. There being no issue of fact, the judgment of the Customs Court is reversed and the case is remanded for entry of an order granting the motion for summary judgment of the United States.

REVERSED

MILLER, Judge, dissenting, with whom BALDWIN, Judge, joins.

The issue is whether the Customs Court correctly determined that remission of the Japanese commodity tax upon export of the involved electronic goods, coupled with the levy of such tax on consumption of like goods in Japan, constitutes the payment or bestowal, "directly or indirectly," of a "bounty or grant" for purposes of section 303 of the Tariff Act of 1930, as amended (19 USC 1303).

Contrary to the majority opinion, I conclude that the controlling question is a matter of law and not a factual inquiry into the "economic result" of the Japanese commodity tax; that this is really not a case of first impression, since the key language of the statute has been interpreted by the Supreme Court before; that the interpretation by

the Court was basic to its decision and was not *obiter dictum;* that this judicial interpretation prevails over any long-continued administrative practice; and that Congressional "acquiescence" in such administrative practice is a myth.

I would affirm the decision and judgment of the Customs Court except with respect to the date as of which countervailing duties are to be imposed.

The facts

The Customs Court stated the "essential facts" as follows:

> The Japanese Commodity Tax Law, cited as Commodity Tax Law (March 31, 1962, Law No. 48) as revised, is a single-stage consumption tax which is levied usually at the manufacturing level on a fairly extensive list of consumer goods, inclusive of electronic products of the types manufactured by plaintiff. Rates of tax range generally from 5 to 40 percent. Upon exportation of these products from Japan, the tax is either remitted, if previously paid, or the products are exempted from the payment of the tax. [Footnote omitted.]

Additionally, in its answer to Zenith's complaint, the Government admitted that the commodity tax is levied on goods shipped for home consumption and that the tax base is generally the manufacturer's sales price; however, it denied, "for lack of knowledge or information sufficient to form a belief as to the truth therof," that the commodity tax rates set forth in the complaint were applicable to the enumerated products.[1] Nevertheless, most of the rates alleged are shown

[1] The complaint alleged the following rates: Large television receivers (20%); Small television receivers (15%); Color television picture tubes—large (20%) and small (15%); Radio receivers—stereo (15%), other than stereo (and other than housed in metal cases of specified dimension) (10%), and other than stereo housed

in *An Outline of Japanese Taxes* 130-34 (1975), published by the Tax Bureau, Ministry of Finance (Lib. Cong. Ref. No. HJ 2986 .A3 1975), of which we may take judicial notice.[2]

Controlling question a matter of law

The majority opinion declares that it is the economic result of the foreign government's action which controls [whether such action is a "bounty or grant"] and that this requires a factual inquiry. It then says that "the record is silent regarding the economic result of the mere remission of the Japanese commodity tax" and that "[t]he Secretary has presumably determined that the economic result here is not the conferring of such a benefit, subsidy, or incentive as would rise to the level of a bounty or grant under § 303." To this it adds: "The factual underpinnings of the Secretary's negative countervailing duty determination in this case are not under attack."

Of course, such "factual underpinnings" are not under attack, because there are none to attack. Indeed, even a *presumption* that the Secretary made a determination regrading the economic result is rebutted by the record. The majority opinion has confused the Secretary's determination of whether or not remission of the Japanese commodity tax constitutes the payment or bestowal, "directly or indirectly," of a "bounty or grant," which is a matter of

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in metal cases of said specified dimension (5%); Radio-phonograph combinations (15%); Radio-television-phonograph combinations—if television qualifies for 20% rate (20%) and if television qualifies for 15% rate (15%); Record players and phonographs (15%); Tape players, tape recorders, and radio/tape recorder combinations—stereo (15%) and other (10%).

[2] The 5 to 40% range referred to by the Customs Court is shown in 1 W. Diamond, *Foreign Tax and Trade Briefs* 84.7 (1977), which notes that the commodity taxes "generally are paid by the manufacturer."

law, with the factual determination yet to be made by the Secretary of the "net amounts of the bounty or grant paid or bestowed" (on the basis of which countervailing duties are to be assessed) in accordance with the order of the Customs Court.[3]

Concerning the Secretary's "determination" here, all that the record shows is set forth in (1) the Notice of Preliminary Determination, approved by an assistant Secretary of the Treasury on January 30, 1975 (40 Fed. Reg. 5378), referring to the Notice of Countervailing Duty Proceedings[4] in the Federal Register of May 19, 1972 (37 Fed. Reg. 10087), and making a preliminary determination, on the basis of an investigation, that benefits under three Japanese programs (none of which related to the commodity tax) constituted bounties or grants, but were considered to be *de minimis;* (2) an amendment to said Notice of Preliminary Determination, approved by an Acting Assistant Secretary of the Treasury on May 2, 1975 (40 Fed. Reg. 19853), adding the following paragraph thereto:

> Any other programs alleged to result in the payment or bestowal of a bounty or grant within the meaning of section 303 of the Act have been terminated by the Japanese Government and/or are preliminarily deter-

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[3] This court noted in *United States* v. *Hammond Lead Products, Inc.*, 58 CCPA 129, 136, C.A.D. 1017, 440 F.2d 1024, 1029 (1971), that "in the case of the countervailing duty assessment, no injury to a domestic industry need be shown."

[4] The Notice stated that "Information has been received . . . which raises a question as to whether certain payments, bestowals, rebates, or refunds granted by the Government of Japan upon the manufacture, production, or exportation of certain consumer electronic products constitute the payment or bestowal of a bounty or grant, directly or indirectly, within the meaning of section 303 of the Tariff Act of 1930 (19 U.S.C. 1303), upon the manufacture, production, or exportation of the merchandise to which the payments, bestowals, rebates, or refunds apply."

mined not to result in the payment or bestowal of a bounty or grant.[5]

and (3) the Final Negative Countervailing Duty Determination, approved by an Acting Assistant Secretary of the Treasury on December 31, 1975 (41 Fed. Reg. 1298), merely repeating the notice of Preliminary Determination that information developed in the investigation established that benefits under the three Japanese programs (unrelated to the commodity tax) were *de minimis* and concluding as follows:

> Accordingly, on the basis of the additional facts gathered and the investigation conducted . . . a final determination is hereby made in this proceeding, that for the reasons stated, herein and in the notice referred to above [the Notice of Preliminary Determination], no bounty or grant is being paid or bestowed, directly or indirectly, within the meaning of section 303 . . . upon the manufacturer [sic], production, or exportation of certain consumer electronic products from Japan.

Thus, it is seem that there was no determination of economic result by the Secretary with respect to the Japanese commodity tax—not even a *de minimis* determination as in the case of the three other programs referred to—but only a conclusion of law that under any current programs, no bounty or grant is being paid or bestowed, directly or indirectly, within the meaning of section 303. It is the correctness of this conclusion of law that was before the Customs Court, whose decision thereon we review.[6]

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[5] The broad language could be construed to encompass the Japanese commodity tax.

[6] If the majority remains convinced that the economic result of the remission of the Japanese commodity tax is decisive of the issue before us, it should at least remand the case to the Customs Court for development of a record on that point, a task that court is specially equipped to undertake. Failing that, I suggest that the rates of the Japanese commodity tax are such as to establish prima facie that the economic impact (*e.g.* competitiveness of Japanese exports vis-a-vis U.S. manufacturers) of remission of the tax would not be *de minimis*. Significantly, the United States Tariff Commission (now International Trade Commission) made the following statement in its report to the Senate Finance Committee, 5 TRADE BARRIERS 39 (1974):

> For all but a very few U.S. products, the differential between domestic and export prices which is attributable to the exemption of exports from internal consumption taxes is substantially lower than the price differential found in products of most other major trading nations resulting from the exemption of exports from their domestic consumption taxes. [Footnote omitted.]

In its report, THE FUTURE OF U.S. FOREIGN TRADE POLICY, 90th Cong., 1st Sess. 5 (Comm. Print 1967), the Joint Economic Committee of the Congress stated:

> The European Common Market practice of rebating their own indirect taxes on their exports and levying these same taxes on imports—a practice sanctioned, incidentally, by the rules of the GATT—constitutes a conspicuous form of discrimination against U.S. exports. Moreover, similar border adjustments by the United States would be an ineffective weapon, neither mitigating nor offsetting the discriminatory process, because the tax structure of the United States places relatively small emphasis on indirect taxes. This issue is one that the United States will have to resolve.

[7] "That whenever any country . . . shall pay or bestow directly or indirectly, any bounty . . . upon the exportation of any article or merchandise from such country. . . ." There is no support for the statement in the majority opinion that there was "congres-

Key language of statute previously interpreted by Supreme Court

In *Downs* v. *United States*, 187 U.S. 496 (1903), the Supreme Court interpreted the key language of section 5 of the Tariff Act of 1897, 30 Stat. 205,[7] in the course of deciding, as the Court put it, *supra* at 500—

> the single question whether, under the laws and regulations of Russia, a bounty is allowed upon the export of sugar which subjects such sugar, upon its importation into the United States, to an additional duty equal to the entire amount of such bounty, under [section 5 of the Tariff Act of 1897].

The Russian scheme relieved exporters from the ordinary excise tax that would have been payable had the sugar been sold domestically and also provided exporters with certificates which could be sold to sugar producers, who would use them to free-up their surplus sugar for sale in the domestic market without payment of a prohibitive tax burden.

As noted in the majority opinion, the Board of General Appraisers (4 Treas. Dec. 405, T.D. 22984 (1901)) stated, at 413:

> Our conclusion, therefore, is that a bounty or grant, within the meaning of section 5 of our tariff act, has been paid or bestowed by the Russian Government upon the exportation of this sugar, so as to work a benefit or advantage to the Russian sugar exporter as follows:
>
> First. Upon the exportation of the sugar, the Government remitted or refunded the excise tax due there-

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sional refusal" to define the words "bounty" or "grant." Customs Law dictates that the common meaning of such words is intended in the absence of evidence to the contrary. *United States* v. *C. J. Tower & Sons*, 48 CCPA 87, 89, C.A.D. 770 (1961); *Meyer & Lange* v. *United States*, 6 Ct. Cust. Appls. 181, T.D. 35436 (1915). *Webster's International Dictionary* (1890) defines "bounty" as:

> 4. A premium offered or given . . . to encourage any branch of industry, as husbandry or manufactures.

It was merely customary legislative practice for Congress to leave it to the Treasury Department, subject to judicial review, to make individual determinations within such a broad definition.

> on . . . so that he was enabled to place his product upon the market free from the burden of either the regular or additional excise tax.
>
> Second. The certificate which the Gevernment issued to him upon the exportation of his sugar had a substantial market value, and was transferable, and operated as a premium, grant, bonus, or reward.
>
> Looked at from the Russian standpoint, these advantages might, perhaps, be described as a bounty on production, but (in the language of the circuit court of appeals in the Hills Brothers case [*United States* v. *Hills Bros. Co.*, 107 F. 107 (CA 2 1901)], *supra*) "from the standpoint of *other countries*," *they* become a bounty or grant on exportation." [Emphasis supplied.]

Although the Fourth Circuit, in affirming the Circuit Court for the District of Maryland, which had affirmed the Board (opinion unreported), held that the Government of Russia secured to the exporter of that country a money reward or gratuity whenever he exported sugar from Russia and premised that holding on its finding that the Russian exporter of sugar received a certificate, it said (*Downs* v. *United States*, 113 F. 144, 146 (CA 4 1902)):

> In affirming the decree of the court below, we also affirm the judgment rendered by the board of general appraisers, whose opinion so fully expresses our views, and so ably presents the facts involved herein and the law applicable thereto, that we deem it entirely appropriate to adopt the same as part of the opinion of this court.

It is clear that the Supreme Court regarded both the remission of excise taxes upon exportation and the provision of certificates to exporters in assessing the Russian scheme. However, the basis of its decision rested on its interpre-

tation of the key statutory language, particularly the term "bounty." Thus, it explained, *supra* at 502:

> A bounty may be direct, as where a certain amount is paid upon the production or exportation of particular articles, of which the act of Congress of 1890, allowing a bounty upon the production of sugar, and Rev. Stat. sections 3015-3027, allowing a drawback upon certain articles exported, are examples; or indirect, by the remission of taxes upon the exportation of articles which are subjected to a tax when sold or consumed in the country of their production. . . .

Later in its opinion, the Court applied this interpretation to the Russian government's remission of excise taxes as follows, *supra* at 515:

> The details of this elaborate procedure for the production, sale, taxation and exportation of Russian sugar are of much less importance than the two facts which appear clearly through this maze of regulations, viz.: that no sugar is permitted to be sold in Russia that does not pay an excise tax of R. 1.75 per pood and that sugar exported pays no tax at all. . . . When a tax is imposed upon all sugar produced, but is remitted upon all sugar exported, then, by whatever process, or in whatever manner, or under whatever name, it is disguised, it is a bounty on exportation.

With respect to the certificate part of the Russia scheme, the Court noted, *supra* at 512:

> It is practically admitted in this case that a bounty equal to the value of these certificates is paid by the Russian government, and the main argument of the petitioner is addressed to the proposition that this bounty is paid, not upon exportation, but upon production.

Referring to the certificate as an *additional* bounty, the Court then proceeded to answer petitioner's argument and determine that the certificate came within its interpretation of the key statutory language, *supra* at 513:

> If the additional bounty paid by Russia upon exported sugar were the result of a higher protective tariff upon foreign sugar, and a further enhancement of prices by a limitation of the amount of free sugar put upon the market, we should regard the effect of such regulations as being simply a bounty upon production, although it might incidentally and remotely foster an increased exportation of sugar; *but where in addition to that these regulations exempt sugar exported from excise taxation altogether,* we think it clearly falls within the definition of an indirect bounty upon exportation. [Emphasis supplied.]

Thus, the fact that this "additional bounty" was coupled with remission of the excise tax, which the Court determined to come within its interpretation of "bounty upon exportation" in the statute, was the basis for its decision that the certificate was "an indirect bounty upon exportation." *Had the Court not determined that remission of the excise tax was a "bounty on exportation," its decision on the certificate portion of the Russian scheme would have been otherwise.*

Not to be overlooked is the fact that in their briefs before the Court, both Downs and the Government argued the question of whether the remission of excise taxes upon exportation of sugar is a "bounty or grant on exportation" as the terms were used in the statute, with Downs, the importer, contending in the negative and the Government saying (R 236):

> For it seems that any special favor, benefit, advantage, or inducement conferred by the Government, even if it is given as a release from the burden and is

not a direct charge upon the Treasury, is fairly included in the idea and meaning of an indirect bounty.

Nevertheless, the majority opinion would treat the Supreme Court's interpretation of the key language in section 5 as mere dictum, saying that the court's decision was that the Russian scheme (as a whole) bestowed a bounty and that "the broad language" (quoted above) "was not necessary to the Supreme Court's decision and was not, therefore, its ratio decidendi"; further, that the "broad language did not constitute a Supreme Court holding that every nonexcessive remission of every excise tax constitutes a bounty or grant as a matter of law." Of course, the quoted interpretative language did not say that every nonexcessive remission of every excise tax constitutes a bounty or grant. The Court carefully phrased its interpretation to couple with such remission the condition that such tax be paid on the articles when sold or consumed domestically.[8] To conclude that, because the decision had to do with the "Russian scheme," which included *two* bounties, (1) remission of the excise tax and (2) provision of certificates of value, the Court's interpretation of "bounty" with respect to the remission of the excise tax portion of the scheme is not ratio decidendi is manifestly erroneous. As pointed out above, that interpretation was the basis for the decision that the certificate portion of the scheme was an indirect bounty upon

[8] Whether the "bounty or grant" in a particular case would be *de minimis* (not, therefore, warranting imposition of a countervailing duty) or what the net amount of the "bounty or grant" would be as a basis for imposition of a countervailing duty is, of course, another matter. Thus, as appellant has shown, the market value of the certificate in *Downs* was from 1.25 to 1.64 rubles per pood, and the excise tax remitted was 1.75 rubles per pood; whereas, the *net* bounty determined ranged from only .38 to .50 rubles per pood (T.D. 22814, 4 Treas. Dec. 181 (1901)). It is not disclosed what factors entered into the determination. See *F. W. Woolworth Co.* v. *United States*, 28 CCPA 239, C.A.D. 151 (1940).

exportation. Moreover, since the Supreme Court clearly determined that *both* remission of the excise tax and the certificate constituted a bounty, there were two grounds upon either of which it rested its decision. Each ground represented the judgment of the court and was of equal validity with the other. *Woods* v. *Interstate Realty Co.*, 337 U.S. 535, 537 (1949); *Massachusetts* v. *United States*, 333 U.S. 611, 623 (1948); *Richmond Co.* v. *United States*, 275 U.S. 331, 340 (1928); *United States* v. *Title Insurance Co.*, 265 U.S. 472, 486 (1924); *Union Pacific Co.* v. *Mason City Co.*, 199 U.S. 160, 166 (1905); *Railroad Companies* v. *Schutte*, 103 U.S. 118, 143 (1880).

Thus, the Court's determination that remission of the excise tax was a "bounty" did not constitute mere *obiter dictum* as did the statement treated in *Kastigar* v. *United States*, 406 U.S. 441 (1972), cited by the majority, whose assertion that "we confront a case of first impression" simply begs the question. Rather, the Court's interpretation is akin to the Court's explanation in *Towne* v. *Eisner*, 245 U.S. 418 (1918), of the essential nature of a stock dividend in interpreting the Income Tax Act of October 3, 1913.[9] That explanation was relied upon by the Court

[9] In *Towne* v. *Eisner*, the question was whether a stock dividend made in 1914, against surplus earned *before* the effective date of the Sixteenth Amendment, was taxable under the Income Tax Act of October 3, 1913. The lower court had decided for the taxpayer, treating the question as inseparable from interpretation of the Sixteenth Amendment. The Supreme Court disposed of the question upon consideration of the essential nature of a stock dividend, disregarding the fact that the dividend involved was based upon surplus earnings that accrued before the Sixteenth Amendment took effect, and quoting from its opinion in *Gibbons* v. *Mahon*, 136 U.S. 549 (1890) as follows:

> "A stock dividend really takes nothing from the property of the corporation, and adds nothing to the interests of the shareholders. Its property is not diminished, and their interests are not increased. . . . The proportional interest of each shareholder remains the same. The only change is in the evidence

in *Eisner* v. *Macomber*, 252 U.S. 189 (1920), where the question was whether a stock dividend, made against profits accumulated by a corporation *after March 1, 1913*, was taxable under the Revenue Act of 1916. In affirming the judgment below for the taxpayer, the Court said, *supra* at 204-05:

> Therefore, *Towne* v. *Eisner* cannot be regarded as turning upon the point that the surplus accrued to the company before the act took effect and before adoption of the Amendment. And what we have quoted from the opinion in that case cannot be regarded as *obiter dictum*, it having furnished the entire basis for the conclusion reached. We adhere to the view then expressed, and might rest the present case there . . . because the conclusion there reached as to the essential nature of a stock dividend necessarily prevents its being regarded as income in any true sense.

In its efforts to downgrade *Downs*, the majority opinion ignores the Supreme Court's own recognition of its precedential value in *Nicholas & Co.* v. *United States*, 249 U.S. 34 (1919), which involved the petitioner's protest against the action of collectors of customs at Boston and New York assessing countervailing duties on whiskey and gin imported from Great Britain. The Supreme Court affirmed the judgment of the Court of Customs Appeals (the predecessor to this court), which had affirmed a de-

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which represents that interest, the new shares and the original shares together representing the same proportional interest that the original shares represented before the issue of the new ones." *Gibbons* v. *Mahon*, 136 U.S. 559, 560. In short, the corportation is no poorer and the stockholder is no richer than they were before. . . . What has happened is that the plaintiff's older certificates have beer split up in effect and have diminished in value to the extent of the value of the new. [*Id.* at 426-27.]

cision by the Board of General Appraisers (the predecessor to the Customs Court) overruling the protests. The issue was the legality of the countervailing duty, which had been determined to be necessary under Paragraph E of section 4 of the Tariff Act of 1913 (38 Stat. 114)[10] by reason of the allowance under British law of three pence per gallon upon plain British spirits and five pence per gallon upon British compounded spirits paid on account of export from the United Kingdom.[11] Referring to Paragraph E, the Court, *supra* at 39, said:

> The statute was addressed to a condition and its words must be considered as intending to define it,

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[10] Paragraph E was substantially the same as section 303 of the Tariff Act of 1930 and as section 303(a)(1) under the 1970 amendment, the statute herein involved. Paragraph E was preceded by Paragraph E of section 4 of the Tariff Act of 1913 (38 Stat. 114, 193); section 6 of the Tariff Act of 1909 (36 Stat. 11, 85); and section 5 of the Tariff Act of 1897(30 Stat. 151, 205). Prior to the latter, paragraph 182½ of the Tariff Act of 1894 (28 Stat. 509, 521) provided for payment of additional duty on sugar, syrups, and molasses where the exporting country paid a *bounty* on the export thereof; and paragraph 237 of the Tariff Act of 1890 (26 Stat. 567, 584) made similar provision in the case of sugar only. In its brief, the Government contends that the 1897 Act was intended to apply to the refund of taxes only to the extent that the "refund" exceeded the amount of tax actually paid (*i.e.* the "excessive remission"). This appears to have been so under the specific language of the 1890 and 1894 Acts. However, different language appeared in the subsequent acts, and the legislative history of the 1897 Act cited by the Government can hardly be used now to overturn the Supreme Court's interpretation in *Downs* of "bounty" in the 1897 Act. The Government's argument, of course, has no application to "grant" (added by the 1897 Act). If it did, it would imply that there was no Congressional purpose in adding "grant" to the language of the statute.

[11] The law also provided for payment of an allowance of two pence per gallon "to any Distiller or Proprietor of . . . Spirits on the Exportation thereof from a Duty-free Warehouse, or in depositing the same in a Customs Warehouse." However, this payment was not involved in the case.

and all of them—"grant" as well as "bounty" must be given effect. If the word "bounty" has a limited sense the word "grant" has not. A word of broader significance than "grant" could not have been used. Like its synonyms "give" and "bestow," it expresses a concession, the conferring of something by one person upon another. And if the "something" be conferred by a country "upon the exportation of any article or merchandise" a countervailing duty is required by Paragraph E.

The Court next, *supra* at 39-40, stated, in language reminiscent of *Downs,* the pragmatic principle on which it rested its decision that the payment by the British government was the bestowal "directly or indirectly" of a "bounty or grant":

> We have the fact of spirits able to be sold cheaper in the United States than in the place of their production, and this the result of an act of government because of the destination of the spirits being a foreign market. For that situation Paragraph E was intended to provide.

The Court cited *United States* v. *Passavant,* 169 U.S. 16 (1898), as support for its pragmatic approach, saying: "It [the Court in *Passavant*] regarded the fact and effect of the remitted excise."[12] It then recognized the precedential value of *Downs,*[13] *supra* at 41:

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[12] *Passavant* held that in determining dutiable value of goods imported from Germany, there should be added to the net invoice price the amount of tax imposed upon the goods when sold by the manufacturer thereof for consumption or sale in Germany but remitted upon exportation of the goods.

[13] As had the Government in its brief, saying of *Downs*:

> The Russian bounty case was summed up in a single sentence in the opinion (187 U.S. 515): "When a tax is imposed on all sugar produced, but is remitted upon all sugar exported, then, by whatever process, or in whatever manner, or under whatever name it is disguised, it is a bounty upon exportation."

> *Downs* v. *United States,* 187 U.S. 496, is a like example [of the pragmatic approach], and direct and indirect bounties are illustrated. . . . [*A*]*s instances of the latter, that is, of indirect bounties, the remission of taxes upon the exportation of articles which are subject to a tax when sold or consumed in the country of their production is given,* and, as another example, the laws permitting distillers of spirits to export the same without payment of an internal revenue tax or other burden. [Emphasis supplied.]

If the majority's erroneous approach to precedent were followed, the judicial function of statutory interpretation would be reduced to merely deciding that the facts of a particular case are or are not within the reach of a particular statute. The judicial function of giving life and meaning to the words of a statute for guidance to other courts as well as to the executive and legislative branches of government would be emasculated, and interminable litigation would be spawned.[14]

Judicial interpretation prevails over "long-continued, uniform, administrative practice"

The majority opinion states that, since 1898, the Treasury Department has consistently and uniformly interpreted § 303 as requiring that for a remission of an excise tax to constitute a bounty it must be "excessive."[15] It

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[14] Cf. E. GRISWOLD, THE JUDICIAL PROCESS 31 (1973): "In many areas precedents, especially ones of a few years' standing, are not given very great weight. This in turn stimulates litigation on a great mass of questions. . . ."

[15] This statement apparently does not take account of the countervailing duties assessed by Treasury in *Downs* and the Govern-

then cites the familiar rule that long-continued, uniform administrative practice, if not contrary to or inconsistent with law, is entitled to great weight, particularly when Congress has failed to revise the statute in the face of such administrative practice; and it finds no Congressional action contrary to or inconsistent with that practice. However, it is to be noted that in none of the cases cited by the majority opinion had there been a judicial interpretation with which the administrative practice was in conflict!

There is another familiar rule, namely: continued reenactment of a statute following its judicial interpretation (especially by the Supreme Court) creates a presumption of Congressional approval of that interpretation. *Shapiro* v. *United States,* 335 U.S. 1, 16 (1947); *Burnet* v. *Harmel,* 287 U.S. 103, 108 (1932); *Hecht* v. *Malley,* 265 U.S. 144, 153 (1924); *Latimer* v. *United States,* 223 U.S. 501, 504 (1912); *Sessions* v. *Romadka,* 145 U.S. 29, 42 (1892). As will be more fully developed later, there has been no Congressional action contrary to or inconsistent with the interpretation of the key statutory language in *Downs.*

When there is a conflict between administrative practice and judicial interpretation, as has been the case here, this court's predecessor long ago held that judicial interpretation prevails. *United States* v. *Douglas & Berry,* 6 Ct. Cust. Appls. 100, T.D. 35342 (1915). That case involved the question of whether the imported goods in

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ment's position in its brief before the Supreme Court in support thereof, wherein the Assistant Attorney General went so far as to say (R. 236):

> For it seems that any special favor, benefit, advantage, or inducement conferred by the Government, even if it is given as a release from burden and is not a direct charge upon the Treasury, is fairly included in the idea and meaning of an indirect bounty.

question were classifiable as "plain woven fabrics" under paragraph 283 of the Tariff Act of 1913. In two earlier cases, the court had interpreted identical language in the predecessor provisions to paragraph 283 (contained in the Tariff Acts of 1897 and 1909 and had rejected the classification of similar goods as "plain woven fabrics." Responding to the importers' argument that goods like those in question were, during the history of the Tariff Act of 1909, classified as plain woven fabrics and that employment of that language in the Tariff Act of 1913 must be presumed to be a recognition of such administrative practice, the court said *supra* at 104:

> Force is often given to such administrative practice, but in the present case it is difficult to see how it could have the force contended for, for the reason that prior to the enactment of this tariff law rulings of this court had been made in the two cases cited, and more specifically and definitely in the later case of White *v.* United States (3 Ct. Cust. Appls., 382; T.D. 32968), that excluded the goods in question from the term "plain woven fabrics," and *it is the latter authoritative decision which the Congress must be presumed to have followed rather than the administrative practice.* [Emphasis supplied.]

The fact that the executive branch does not follow the interpretation of a law by the judicial branch does not render that interpretation any less the law. Nor would acquiescence by the legislative branch in the failure of the executive branch to follow the interpretation of the law by the judicial branch do so. Indeed, a contrary conclusion would deny the role of the judicial branch in our system of government "to say what the law is," as declared in *Marbury* v. *Madison,* 5 U.S. (1 Cranch) 87, 111 (1803).

The myth of Congressional acquiescence in administrative practice

Although the principle stated in *United States* v. *Douglas & Berry* disposes of the administrative practice point, the following portion of the majority opinion should be answered:

> [W]e find it difficult to believe that Congress would harbor in its breast a disapproval of an administrative practice for almost 80 years, while remaining so supine or irresponsible as not to change it. . . . Though the record shows the first specific notice to Congress in 1949, we cannot assume that Congress had earlier reenacted the statute four times without ever informing itself of Treasury's practice. But whether awareness of the practice has continued for 79 years or for 28 years, the inference of acquiescence from Congress' failure to act against the practice over the many years involved, and through many reenactments of the statute, overbalances any inference of rejection from failure to codify it. [Footnote omitted.]

Actually, the record shows that the "first specific notice to Congress" came in 1949 during the course of hearings before the Senate Finance Committee. In 1970 Congress amended section 516 of the Tariff Act of 1930 to provide that, in the case of any imported article or merchandise with respect to which the Secretary has not determined whether or not any bounty or grant is being paid, any person may file a petition setting forth his belief that a bounty or grant is being paid.[16] The Customs Administrative Act of 1970 § 209, Pub. L. No. 91-271, 84 Stat. 274,

[16] If the Secretary concludes that a formal investigation is warranted, he is to initiate one, make a preliminary determination within six months, and make a final determination within twelve months.

286. (Zenith filed such a petition in this case.) So the period of "awareness" of Treasury's practice on the part of "Congress" before it endeavored to do something about the practice shrinks from 79 to 21 years. The supposition in the majority opinion of a longer period of "awareness" on the part of *Congress* is pure speculation.

As Judge Newman noted in his concurring opinion below, the Treasury Department attempted to persuade Congress to amend section 303 of the Tariff Act of 1930 to accord with the Department's practice of not assessing countervailing duties on the remission of taxes.[17] This and another attempt (by the State Department)[18] failed. In the perspective of the principle stated in *United States* v. *Douglas & Berry, supra,* Judge Newman aptly remarked:

> It is apparent, then, that Congress could have, but declined to, nullify the Supreme Court's interpretation of the countervailing duty statute insofar as tax remissions are concerned. A reasonable conclusion from the congressional rejection of the . . . proposed amendments . . . is that Congress was satisfied with the way it had earlier written the statute, and ap-

[17] *Hearings on H.R. 1535 Before the House Committee on Ways and Means,* 82d Cong., 1st Sess. 2, 16, 35, and 79 (1951). (H.R. 1535, which would have been entitled "Customs Simplification Act of 1951," was introduced "by request" of the Secretary.) *Hearings on H.R. 5505 Before the Senate Committee on Finance,* 82d Cong. 2d Sess. 115, 124-125 (1952). (H.R. 5505 supplanted H.R. 1535 as a "clean bill.")

[18] The Department's representative advised the Senate Finance Committee that an amendment to conform section 303 with administrative practice was needed to make the countervailing duty law fully consistent with Article VI of the General Agreement on Tariffs and Trade. *Hearings on H.R. 1612* ("Trade Agreements Extension Act of 1951") *Before the Senate Committee on Finance,* 82d Cong., 1st Sess. 11 (1951).

proved of the Supreme Court's construction of the law.[19]

The majority opinion recalls that during hearings before the House Committee on Ways and Means in 1973 on the bill which matured into the Trade Act of 1974 (Pub. L. No. 93-618, 88 Stat. 1978), "a witness" recommended an amendment defining "bounty or grant" as encompassing the remission of an excise tax and that there was no action taken on the recommendation. This can hardly be said to rise to the level of Congressional acquiescence in administrative practice, much less a repudiation by Congress of the interpretation of the key language in section 303 by the Supreme Court.

The majority opinion points to Congressional adoption, as § 321(b) of the Trade Act of 1974, of an amendment to the Antidumping Act, 19 USC 162 (Supp. V 1975), which parallels the standard in that Act to the standard set forth in the countervailing duty law; further, to the following statements in the committee reports:

> However, your committee [Ways and Means], in recommending this amendment, does not express approval or disapproval of the standard employed by the Treasury Department in administering the countervailing duty law with regard to the treatment under that law of rebates or remissions of direct and indirect taxes. [H.R. Rep. No. 93-571, 93d Cong., 1st Sess. 69 (1973).]

[19] The majority opinion notes an earlier unsuccessful attempt by Treasury in 1950, but says: "Congress' failure to act or even speak against it [the Treasury proposal] reflected at least a then-current willingness to allow that administrative practice to continue unabated and unchanged." Such a comment ignores the principle stated in *United States* v. *Douglas & Berry, supra.* The correct conclusion to be drawn from failure of the Treasury proposal is that stated by Judge Newman. See *United States* v. *Adolphe Schwob, Inc.*, 21 CCPA 116, 120, T.D. 46447 (1933).

And—

> The standard in the proposed amendment parallels that standard employed by the Treasury Department under the countervailing duty law in determining whether tax rebates and remissions constitute bounties or grants. However, the Committee [Senate Finance], in recommending this amendment, does not express approval or disapproval of that Treasury practice. [S. Rep. No. 93-1298, 93d Cong., 2d Sess. 172 (1974).]

On the basis of the foregoing, the majority opinion concludes: "The effect of the Committees' mutually contradictory approve-disapprove statements is necessarily to leave untouched the status quo with respect to the administrative practice on countervailing duties." Again the majority ignores the principle stated in *United States* v. *Douglas & Berry, supra.* The correct conclusion is that such statements left untouched the status quo with respect to the Supreme Court's interpretation of the key language in section 303.

The majority opinion notes that, in 1968, the Senate Finance Committee was advised that Treasury considered § 303 inapplicable to nonexcessive remissions of excise taxes; that no action was taken at that time; and that, in 1970, the Committee requested a detailed study on the subject. The "request" was a direction to the Tariff Commission contained in section 362 of H.R. 17550, which did not become law. The Senate Finance Committee, in its report on the bill (S. Rep. No. 91-1431, 91st Cong., 2d Sess. 281 (1970)) stated, *inter alia:*

> The committee is also aware of the Supreme Court cases, and a recent Customs Court case which has interpreted the words "bounty" or "grant" to apply to virtually all subsidies, including the rebate of indirect taxes.

A request for a study was subsequently made jointly by the chairman of the Senate Finance Committee and the chairman of the Subcommittee on International Trade to the Tariff Commission, which transmitted its voluminous report, TRADE BARRIERS, *supra* note 6, in 1974.[20] This can hardly be said to rise to the level of a repudiation by the Congress of the interpretation of the key language in section 303 by the Supreme Court. Rather, the request for a study by the Tariff Commission constituted merely a prudent step by a Congressional Committee to acquire information needed to make a decision whether to recommend any changes in the law beyond the 1970 amendment, referred to above, providing for the filing of a petition by any person setting forth his belief that a bounty or grant is being paid. Following receipt of the Trade Commission's report, the judicial review provision, discussed *infra,* was enacted as part of the Trade Act of 1974.

Referring to this court's opinion in *American Express Co.* v. *United States,* 60 CCPA 86, C.A.D. 1087, 472 F.2d 1050 (1973), the majority opinion says that "we expressed the view that Congress required the Secretary to impose a countervailing duty when a bounty or grant has

[20] Of particular significance, the report (Vol. VI at 30-31) states:

> Several governments provide tax advantages to exporters. This is done usually by exempting or deferring taxes on income from export activities, or rebating other direct taxes associated with the production of exported products, or by accelerated amortization of assets used in production for export.
>
> Under current GATT rules, indirect (consumption) taxes may be rebated (or not collected) on exported products, but rebates of direct taxes (income and certain other taxes) are not permitted. This rule is based on the premise that indirect taxes are fully shifted forward to the consumer, whereas direct taxes are not. To the extent, however, that the forward shifting of indirect taxes is incomplete, the full restitution of the domestic consumption tax at the border on exported products acts, in effect, as a subsidy of exports. [Footnote omitted.]

been bestowed, but left to the Secretary the determination of whether a bounty or grant had in fact been bestowed" and that "[n]othing has occurred since 1973 to require change in that view." However, a close reading of the opinion in that case reveals no suggestion whatsoever that this court would approve a Secretarial determination that was contrary to the interpretation of "bounty" by the Supreme Court. With respect to what has occurred since 1973, provision in the Trade Act of 1974 for judicial review of the Secretary's determination that a bounty or grant is not being paid on foreign merchandise reflects, as shown *infra* note 26, expressed *Congressional concern* over "inaction or insufficient action, or . . . excessive delay in the administrative process."

That provision was enacted in response to the majority opinion of this court in *United States* v. *Hammond Lead Products, Inc., supra* note 3. Hammond Lead had filed a complaint with the Commissioner of Customs asserting that litharge[21] imported from Mexico was the recipient of a bounty or grant from the Mexican government and, therefore, that a countervailing duty was required to be imposed under section 303 of the Tariff Act of 1930. The Commissioner of Customs, acting for the Secretary, responded that the classification and rate of duty on litharge were correct and that countervailing duties were not applicable. Hammond Lead then brought an action in the Customs Court under section 516(b) of the Tariff Act of 1930, protesting the classification and rate of duty. The Government and one Ralph Valls, Party-In-Interest, moved to dismiss on the ground that the Customs Court lacked jurisdiction of the subject matter of an American manufacturer's protest which complained that the Secretary failed to invoke a countervailing duty. Motions to

[21] The court stated that litharge is a lead oxide, made from refined lead by a simple process and containing 93% primary lead metal. Its main use is in storage batteries and in the chemical and paint industries.

dismiss were denied, and trial on the merits followed. The Customs Court sustained Hammond Lead's protest on the theory that there was an indirect bounty or grant on export of the litharge from Mexico.[22]

On appeal, this court, split 3-2, held that the Customs Court lacked jurisdiction.[23] It concluded, *supra* at 137:

> All considered, it appears that countervailing duty is a penal exaction [24] that the Congress did not intend the courts to impose, should the Treasury be recalcitrant, in a 516(b) proceeding . . . .

In the course of extended dicta, the majority opinion obliquely referred to the "dicta" in *Downs* and went on to say, *supra* at 140-41:

> It may be asked, if our interpretation of section 516(b) is correct, does it leave the American Manufacturer entirely remediless even in case of an arbitrary and capricious refusal by Treasury to take appropriate action under the countervailing duty law. It is difficult to answer the question without deciding in

[22] Following devaluation of the peso in 1954, Mexico increased export taxes on refined lead for the purpose of maintaining domestic supplies and keeping down domestic prices. Refined lead was made available to domestic users at a price approximating the world price minus what the export tax would have been. Exports of litharge were not subjected to the export tax, so that Mexican litharge producers could offer litharge in other countries at a price predicated on the domestic lead price unenhanced by the export tax.

[23] The dissenting opinion concluded that the Customs Court had jurisdiction of the protest under section 516(b), citing ***Bradford Co.*** v. ***American Lithographic Co.***, 12 Ct. Cust. Appls. 318, T.D. 40318 (1924). Further, it stated that the Customs Court was correct in concluding that there was a bounty or grant, citing the definitions thereof in *Nicholas* and *Downs, supra.*

[24] The statement that a countervailing duty is "penal" was repudiated in a 1972 Senate Finance Committee report. ***Infra,*** note 26.

dictum cases not before us, but a few observations will be made. The Second Circuit, in *J. C. Penney Company, Inc.* v. *United States,* 439 F.2d 63 (decided March 1, 1971), has considered the new statute and reaffirmed holdings under the old, that the regular Federal courts will not interfere in customs cases reviewable in the Customs Court, because an importer desires to tailor a remedy more satisfactory to him than the Customs Court affords. . . . Thus it may be that any decision limiting 516(b) may correspondingly limit the access of a complaining domestic industry to any kind of court relief. On the other hand, the modern tendency to fashion a remedy for any injury is a strong one, and it could be the regular courts would take jurisdiction in cases outside section 516(b), where the domestic industry showed clear illegality and substantial injury. Such a proceeding would not be a *de novo* determination like the one the court below made here, but would, we think, be more in the nature of a review of the administrative decision, which would be overturned only if found arbitrary, capricious, or not founded on substantial evidence. A court considering the fashioning of such relief would have to consider its need in light of judicial remedies, and also such extrajudicial ones as the domestic industry might have, in resort to the Congress or to the Tariff Commission. We do not undertake to predict the answer.

The response of Congress was to include in the Trade Act of 1974 an amendment to section 516 which, as noted above, provides for judicial review of the Secretary's determination that a bounty or grant is not being paid on foreign merchandise.[25] As a prelude to this Congressional

[25] Review can be sought in the Customs Court by "an American manufacturer, producer, or wholesaler of merchandise of the same class or kind as that described in such determination."

action, in 1972 the Senate had tacked onto a minor House-passed tariff bill an amendment, providing for judicial review, at the instance of American producers, of negative countervailing duty determinations by the Secretary.[26] Although the amendment was accepted by the House-Senate conferees (H.R. Rep. No. 92-1583, 92d Cong., 2d Sess. (1972); S. Rep. No. 92-1298, 92d Cong., 2d Sess., (1972)) the Conference Report was not brought to a vote in the

[26] In reporting out the amended bill, the Senate Finance Committee report (S. Rep. No. 92-1221, 92d Cong., 2d Sess. 8 (1972)) stated:

> The Committee amendment providing judicial review to domestic producers in countervailing duty cases is necessitated because of a 1971 decision of the Court of Customs and Patent Appeals (*United States* v. *Hammond Lead Products, Inc.*) holding that judicial review was not available to American producers in countervailing duty cases. The Committee is concerned that the decision might adversely affect the ability of American producers to obtain meaningful relief against subsidized import competition under the Countervailing Duty Law (section 303 of the Tariff Act) because of administrative inaction or insufficient action, or because of excessive delay in the administrative process.
>
> In addition, importers enjoy the right to judicial review in countervailing duty cases under existing law. The Committee believes that American producers as well as importers should be permitted to have the right to judicial review in countervailing duty cases as a matter of basic equity and fairness, and as a means to secure administration of the law in keeping with the intent of Congress reflected in the broad, explicit and mandatory terms used in section 303.
>
> The Countervailing Duty Law requires the Secretary of the Treasury to assess an additional duty on imports of dutiable articles with respect to which a bounty or grant has been paid. The additional duty must be equal to the amount of the bounty or grant, thereby neutralizing the artificial advantage afforded the foreign product by virtue of the subsidy. Consequently, countervailing duties are not, nor were they ever intended to be, penal in nature: they are remedial in nature inasmuch as they operate to offset the effect of subsidies afforded foreign merchandise.

House as an accommodation to the Secretary, with the understanding that the matter would be given attention in the context of trade legislation in the next Congress (118 Cong. Rec. 37098 (1972)). The judicial review provision was subsequently included in the House-passed version of what became the Trade Act of 1974, with the House Ways and Means Committee Report expressing similar views to those of the Senate Finance Committee (quoted in note 26, *supra*) in its report accompanying the 1972 bill (H.R. Rep. No. 93-571, 93d Cong., 1st Sess. 76 (1973)).

In view of the foregoing, the conclusion is inescapable that the Congress has not acquiesced in the administrative practice of failing to recognize the ordinary remission of excise taxes as a bounty or grant for purposes of section 303, much less repudiated, or given any signal of its disfavor with, the interpretation of the key language in section 303 by the Supreme Court.

Date for imposition of countervailing duties

The Customs Court ordered that countervailing duties be assessed on the subject electronic products exported from Japan effective the day following the date of entry of its order. Section 516(g) of the Tariff Act of 1930, as amended (19 USC 1516(g)), provides that only merchandise entered for consumption (or withdrawn from warehouse for consumption) after the date of *publication* of a Customs Court's decision will be affected. Therefore, the Government argues that the Customs Court's order in this case "encompasses entries the liquidation of which is not the proper subject of direction by the Customs Court under the enabling statute, which is clearly jurisdictional in its scope and effect." Appellee contends that *entry* of the Customs Court's order constituted "*publication*" for purposes of section 516(g) and that the Customs Court's order was proper.

Section 257 of 28 USC provides that all decisions of the Customs Court shall be filed and be open to inspection and that the Secretary shall *publish* weekly such decisions as he or the court may designate and abstracts of all other decisions. Thus, the statutes distinguish between filing or entry of a decision and *publication* thereof, which obviously would not occur simultaneously with the filing or entry. Until January 4, 1967, publication was in "Treasury Decisions." Effective January 4, 1967, the name was changed to "Customs Bulletin" (31 Fed. Reg. 16580).

Although appellee argues that "publication" means "making available to the public," which would occur upon the filing or entry of court orders and decisions, I am satisfied that the word "publication" in section 516(g) and the word "publish" in section 257 are in pari materia; further, that acquiescence by Congress in the Secretary's practice of carrying out its mandate in section 257 creates a presumption of Congressional approval of that practice. Appellee has provided no evidence clearly showing Congressional disapproval of that practice.

Accordingly affirmance of the Customs Court's decision and judgment with respect to the Japanese commodity tax should be coupled with an order that the order of the Customs Court with respect to the imposition of countervailing duties be modified (1) to become effective the day after the date of publication of its decision in the Customs Bulletin and (2) to provide that assessment of countervailing duties be subject to possible suspension under the provisions of 19 USC 1303(d)(2).

APPENDIX D

APPENDIX D

Statutes Involved

Section 303 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1303 (Supp. V 1975):

Countervailing duties.

(a) Levy of countervailing duties.

(1) Whenever any country, dependency, colony, province, or other political subdivision of government, person, partnership, association, cartel, or corporation, shall pay or bestow, directly or indirectly, any bounty or grant upon the manufacture or production or export of any article or merchandise manufactured or produced in such country, dependency, colony, province, or other political subdivision of government, then upon the importation of such article or merchandise into the United States, whether the same shall be imported directly from the country of production or otherwise, and whether such article or merchandise is imported in the same condition as when exported from the country of production or has been changed in condition by remanufacture or otherwise, there shall be levied and paid, in all such cases, in addition to any duties otherwise imposed, a duty equal to the net amount of such bounty or grant, however the same be paid or bestowed.

(2) In the case of any imported article or merchandise which is free of duty, duties may be imposed under this section only if there is an affirmative determination by the Commission under subsection (b)(1) of this section; except that such a determination shall not be required unless a determination of injury is required by the international obligations of the United States.

(3) In the case of any imported article or merchandise as to which the Secretary of the Treasury (hereafter in this section referred to as the "Secretary") has not determined whether or not any bounty or grant is being paid or bestowed—

(A) upon the filing of a petition by any person setting forth his belief that a bounty or grant is being paid or bestowed, and the reasons therefor, or

(B) whenever the Secretary concludes, from information presented to him or to any person to whom authority under this section has been delegated, that a formal investigation is warranted into the question of whether a bounty or grant is being paid or bestowed,

the Secretary shall initiate a formal investigation to determine whether or not any bounty or grant is being paid or bestowed and shall publish in the Federal Register notice of the initiation of such investigation.

(4) Within six months from the date on which a petition is filed under paragraph (3)(A) or on which notice is published of an investigation initiated under paragraph (3)(B), the Secretary shall make a preliminary determination, and within twelve months from such date shall make a final determination, as to whether or not any bounty or grant is being paid or bestowed.

(5) The Secretary shall from time to time ascertain and determine, or estimate, the net amount of each such bounty or grant, and shall declare the net amount so determined or estimated.

(6) The Secretary shall make all regulations he deems necessary for the identification of articles and merchandise subject to duties under this section and for the assessment and collection of such duties. All determinations by the Secretary under this section, and all determinations by the Commission under subsection (b)(1) or this section (whether affirmative or negative) shall be published in the Federal Register.

(b) Injury determination with respect to duty-free merchandise; suspension of liquidation.

(1) Whenever the Secretary makes a final determination under subsection (a) of this section that a bounty or grant is being paid or bestowed with respect to any article or merchandise which is free of duty and a determination by the Commission is required under subsection (a)(2) of this section, he shall—

(A) so advise the Commission, and the Commission shall determine within three months thereafter, and after such investigation as it deems necessary, whether an industry in the United States is being or is likely to be injured, or is prevented from being established, by reason of the importation of such article or merchandise into the United States; and the Commission shall notify the Secretary of its determination; and

(B) require, under such regulations as he may prescribe, the suspension of liquidation as to such article or merchandise entered, or withdrawn from warehouse, for consumption on or after the date of the publication in the Federal Register of his final determination under subsection (a) of this section, and such suspension of liquidation shall continue until the further order of the Secretary or until he has made public an order as provided for in paragraph (3).

(2) For the purposes of this subsection, the Commission shall be deemed to have made an affirmative determination if the commissioners voting are evenly divided as to whether its determination should be in the affirmative or in the negative.

(3) If the determination of the Commission under paragraph (1)(A) is in the affirmative, the Secretary shall make public an order directing the assessment and collection of

duties in the amount of such bounty or grant as is from time to time ascertained and determined, or estimated, under subsection (a) of this section.

(c) **Application of affirmative determinations.**

An affirmative final determination by the Secretary under subsection (a) of this section with respect to any imported article or merchandise shall apply with respect to articles entered, or withdrawn from warehouse, for consumption on or after the date of the publication in the Federal Register of such determination. In the case of any imported article or merchandise which is free of duty, so long as a finding of injury is required by the international obligations of the United States, the preceding sentence shall apply only if the Commission makes an affirmative determination of injury under subsection (b)(1) of this section.

(d) **Temporary provision while negotiations are in progress.**

(1) It is the sense of the Congress that the President, to the extent practicable and consistent with United States interests, seek through negotiations the establishment of internationally agreed rules and procedures governing the use of subsidies (and other export incentives) and the application of countervailing duties.

(2) If, after seeking information and advice from such agencies as he may deem appropriate, the Secretary of the Treasury determines, at any time during the four-year period beginning on January 3, 1975, that—

(A) adequate steps have been taken to reduce substantially or eliminate during such period the adverse effect of a bounty or grant which he has determined is being paid or bestowed with respect to any article or merchandise;

(B) there is a reasonable prospect that, under section 2112 of this title, successful trade agreements will be entered into with foreign countries or instrumentalities providing for the reduction or elimination of barriers to or other distortions of international trade; and

(C) the imposition of the additional duty under this section with respect to such article or merchandise would be likely to seriously jeopardize the satisfactory completion of such negotiations;

the imposition of the additional duty under this section with respect to such article or merchandise shall not be required during the remainder of such four-year period. This paragraph shall not apply with respect to any case involving non-rubber footwear pending on January 3, 1975, until and unless agreements which temporize imports of non-rubber footwear become effective.

(3) The determination of the Secretary under paragraph (2) may be revoked by him, in his discretion, at any time, and any determination made under such paragraph shall be revoked whenever the basis supporting such determination no longer exists. The additional duty provided under this section shall apply with respect to any affected articles or merchandise entered, or withdrawn from warehouse, for consumption on or after the date of publication of any revocation under this subsection in the Federal Register.

(e) **Reports to Congress.**

(1) Whenever the Secretary makes a determination under subsection (d)(2) of this section with respect to any article or merchandise, he shall promptly transmit to the House of Representatives and the Senate a document setting forth the determination, together with his reasons therefor.

(2) If, at any time after the document referred to in paragraph (1) is delivered to the House of Representatives

and the Senate, either the House or the Senate adopts, by an affirmative vote of a majority of those present and voting in that House, a resolution of disapproval under the procedures set forth in section 2192 of this title, then such determination under subsection (d)(2) of this section with respect to such article or merchandise shall have no force or effect beginning with the day after the date of the adoption of such resolution of disapproval, and the additional duty provided under this section with respect to such article or merchandise shall apply with respect to articles or merchandise entered, or withdrawn from warehouse, for consumption on or after such day.

Section 516(d) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516(d) (Supp. V 1975):

Petitions by American manufacturers, producers, or wholesalers.

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(d) **Contest of Secretary's determination that foreign merchandise is not being sold in United States at less than fair value or that bounty or grant is not being paid.**

Within 30 days after a determination by the Secretary——

(1) under section 160 of this title, that a class or kind of foreign merchandise is not being, nor likely to be, sold in the United States at less than its fair value, or

(2) under section 1303 of this title, that a bounty or grant is not being paid or bestowed,

an American manufacturer, producer, or wholesaler of merchandise of the same class or kind as that described in such determination may file with the Secretary a written notice of a desire to contest such determination. Upon receipt of

such notice the Secretary shall cause publication to be made thereof and of such manufacturer's, producer's, or wholesaler's desire to contest the determination. Within 30 days after such publication, such manufacturer, producer, or wholesaler may commence an action in the United States Customs Court contesting such determination.

Section 331(d) of the Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1978, 2049, 2053 (1975).

Amendments to Sections 303 and 516 of the Tariff Act of 1930.

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(d)(1) The amendments made by this section shall take effect on the date of the enactment of this Act.

(2) For purposes of applying the provisions of section 303(a)(4) of the Tariff Act of 1930 (as amended by subsection (a)) with respect to any investigation which was initiated before the date of the enactment of this Act under section 303 of such Act (as in effect before such date), such investigation shall be treated as having been initiated on the day after such date of enactment under section 303(a)(3)(B) of such Act.

(3) Any article which is entered or withdrawn from warehouse free of duty as a result of action taken under title V of this Act shall be considered a nondutiable article for purposes of section 303 of the Tariff Act of 1930, as amended (19 U.S.C. sec. 1303).